# DOCUMENT RESUME

ED 400 365 UD 031 343

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TITLE Federal Title VI Enforcement To Ensure Nondiscrimination in Federally Assisted Programs.

INSTITUTION Commission on Civil Rights, Washington, D.C.

PUB DATE Jun 96

NOTE 710p.

PUB TYPE Reports - Evaluative/Feasibility (142)

EDRS PRICE MF04/PC29 Plus Postage.

DESCRIPTORS *Agency Role; Civil Rights; Equal Education; Equal Opportunities (Jobs); *Federal Legislation; Financial Support; *Government Role; *Law Enforcement; Leadership; Public Agencies; Resource Allocation; *Social Discrimination; State Programs

IDENTIFIERS *Civil Rights Act 1964 Title VI

ABSTRACT

The U.S. Commission on Civil Rights conducted a comprehensive evaluation and analysis of the leadership of the Department of Justice in its Title VI programs and of the Title VI enforcement efforts of 10 Federal agencies and 10 subagencies, including the Department of Education. The purpose of Title VI is to eliminate illegal discrimination in programs or activities funded by the Federal Government. Title VI prohibits a broad range of discriminatory activities and practices. The government's de-emphasizing of civil rights implementation, enforcement, and compliance activities, recent court decisions, and a lessening of Federal interest in state civil rights programs have resulted in deficiencies in Title VI enforcement. The Civil Rights Commission reexamined agency and subagency efforts in light of these policy changes. It is concluded that Federal Title VI enforcement programs at the Department of Justice and other agencies have extensive deficiencies. With the exception of the Department of Education, none of the agencies responsible for enforcing Title VI has an effective enforcement program. Nor do Federal agencies have the resources or personnel to examine the operations of state and local agencies that administer Federal funds to determine their level of Title VI enforcement. Numerous and detailed recommendations are made for ensure meaningful, uniform, and comprehensive enforcement of Title VI of the Civil Rights Act. (Contains 16 tables.) (SLD)

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# Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs

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UD031 343

June 1996

A Report of the U.S. Commission on Civil Rights

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## U.S. Commission on Civil Rights

The U.S. Commission on Civil Rights is an independent, bipartisan agency first established by Congress in 1957 and reestablished in 1983. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices;
- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin;
- Submit reports, findings, and recommendations to the President and Congress;
- Issue public service announcements to discourage discrimination or denial of equal protection of the laws.

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# Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs

June 1996

A Report of the U.S. Commission on Civil Rights

## Letter of Transmittal

The President
The President of the Senate
The Speaker of the House of Representatives

Sirs:

The United States Commission on Civil Rights (Commission) transmits this report, *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs*, to you pursuant to P.L. 103–419.

This report is the result of the Commission's commitment to furthering the elimination of discrimination in federally assisted programs by improving the quality of Federal civil rights implementation, compliance, and enforcement. To accomplish these goals, the Commission conducted a comprehensive evaluation and analysis of the U.S. Department of Justice's performance of its Title VI leadership and coordination responsibilities. In addition, through a Title VI survey, document requests, and followup interviews, the Commission analyzed the Title VI enforcement efforts of 10 Federal agencies and 10 subagencies.

The research and field investigations conducted for this report establish that Federal Title VI enforcement effectively has been dormant. The Department of Justice has neglected its responsibility under Executive Order 12,250 to ensure consistent and effective implementation, compliance, and enforcement of Title VI in all federally funded programs and activities. With few exceptions, the Federal agencies responsible for Title VI enforcement also have disregarded Title VI enforcement. Specifically, the Federal agencies have neglected both their own implementation, compliance, and enforcement responsibilities over their recipients and subrecipients, and their oversight and monitoring obligations over State primary recipients that administer and operate federally assisted programs.

This report contains numerous, detailed recommendations that must be implemented by the President, Congress, the Department of Justice, and the Federal agencies to ensure uniform, comprehensive, and meaningful enforcement of Title VI. Until these recommendations are implemented, the Federal Government will be unable to guarantee that its federally assisted programs are free of discrimination based upon race, color, or national origin.

The Federal Government has a moral imperative to ensure that its programs are operated and administered without discrimination and that all persons have an equal opportunity to participate in them. The Commission urges you, as the highest leaders of our country, to demonstrate the Federal Government's commitment to achieving nondiscrimination in its programs by moving aggressively to adopt the Commission's recommendations and taking immediate action to ensure that the Department of Justice and the Federal agencies implement these recommendations.

Respectfully,

For the Commissioners,

Mary Frances Berry

Mary Frances Berry
*Chairperson*

## Acknowledgments

This report was prepared under the direction and supervision of Frederick D. Isler, Assistant Staff Director for Civil Rights Evaluation. The report's principal authors were Frederick D. Isler, Kathryn Monroe,* Christine Plagata-Neubauer, Tami Trost, and Nadja Zalokar. Rosalind Gray,* Wanda Johnson, Franklin Chow, Michael Fauntroy,* and Eileen Rudert also made major contributions to the research for this report. Grover Hankins, Professor of Law, Thurgood Marshall School of Law, and Alan Jenkins, Assistant Counsel, NAACP Legal Defense and Educational Fund, Inc, provided outside consultation. The legal review was performed by Stephanie Moore. Editorial review was provided by Conner Ball, Barbara Brooks, Betty Edmiston, Carol-Lee Hurley, and Melvin Jenkins. Editorial assistance was provided by James S. Cunningham, David Chambers, William Lee, Eric Mann, and Fernando Serpa. Latrice Fosheé, Shirley Womack, and Clarence Gray** provided administrative support for the project. Gloria Hong supervised the production of the report.

* No longer with the Commission.
** Deceased.

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# Executive Summary

On July 2, 1964, Congress enacted the Civil Rights Act of 1964,[1] the most comprehensive piece of civil rights legislation since Reconstruction. Title VI of the Civil Rights Act prohibits discrimination in all federally funded programs and activities. It provides that:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[2]

The purpose of Title VI is to eradicate illegal discrimination in programs or activities funded by the Federal Government. Title VI prohibits a broad range of discriminatory activities, including denial of services; differences in the quality, quantity, or manner of services; different standards for participation; discrimination in any activity conducted in a facility built with Federal funds; and discriminatory employment practices if the primary purpose of the program is to provide employment or if the employment practice causes discrimination with respect to potential or actual beneficiaries. These prohibited practices have been interpreted to include, among other actions, incidents of racial or ethnic harassment,[3] the creation of a hostile racial or ethnic environment,[4] and a disproportionate burden of environmental health risks on minority communities.[5]

To prevent recipients from using Federal funds to support discriminatory programs or activities, Congress authorized and directed the Federal funding agencies to implement and enforce Title VI in their federally funded programs. To coordinate the Title VI implementation, compliance, and enforcement activities of Federal agencies, Congress vested the President with the authority to approve all rules, regulations, and orders issued by the Federal agencies.[6] Over the past 30 years, the President has delegated his Title VI leadership, oversight, and coordination functions to the Attorney General in a series of Executive orders.[7] The most recent of those orders, Executive Order 12,250, issued by President Jimmy Carter in November 1980, directs the Attorney General to provide leadership and coordinate the plementation, compliance, and enforcement responsibilities of the Federal agencies.[8]

Two decades have elapsed since the U.S. Commission on Civil Rights (Commission) evaluated the Federal agencies' Title VI enforcement efforts in a series of reports published in the early and

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[1] Pub. L. No. 88–352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

[2] 42 U.S.C. § 2000d (1988).

[3] *See* U.S. Department of Education, "Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance," 59 Fed. Reg. 11,448 (1994).

[4] U.S. Department of Housing and Urban Development, "HUD Seeks Resignation of Vidor-area Public Housing Officials in Wake of Recent Racial Strife and Harassment," HUD press release, HUD No. 93–78, Sept. 14, 1993. *See also* Young v. Cisneros, Civil Action No. P–80–8–CA (E.D. Tex. Feb. 3, 1994)(notice of filing and desegregation plan).

[5] *See* Exec. Order No. 12,898, 30 Weekly Comp. Pres. Doc. 276 (Feb. 14, 1994); Memorandum on Environmental Justice, 30 Weekly Comp. Pres. Doc. 279 (Feb. 14, 1994).

[6] 42 U.S.C. § 2000d-1 (1988).

[7] *See* Exec. Order No. 11,247, 3 C.F.R. 348 (1964–1965), *superseded by*, Exec. Order No. 11,764, 3 C.F.R. 849 (1971–1975), *revoked by* Exec. Order 12,250, 3 C.F.R. 298 (1981), *reprinted in* 42 U.S.C. § 2000d-1 (1988).

[8] Exec. Order No. 12,250, §§ 1–101, 1–201, 3 C.F.R. 298 (1981), *reprinted in* 42 U.S.C. § 2000d-1 (1988).

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mid-1970s.[9] In those reports, the Commission found that the Federal agencies were not enforcing Title VI effectively. The Commission also found that the Federal agencies' Title VI enforcement programs were understaffed and poorly coordinated. After the Commission's last Title VI report, the Commission has monitored the Federal agencies' Title VI programs periodically and discovered that the deficiencies identified in 1974 have persisted for 20 years. For this reason, the Commission once again evaluated the Title VI enforcement activities of the Federal agencies and found that Federal Title VI enforcement has remained dormant. Moreover, the Department of Justice has neglected its responsibility to ensure nondiscrimination in all federally funded programs and activities.

Since the publication of the Commission's earlier reports, three important developments have significantly affected Title VI implementation, compliance, and enforcement. First, the Federal Government deemphasized statutory and mandatory civil rights implementation, compliance, and enforcement activities, and reduced the resources available to conduct comprehensive and effective civil rights programs. In the last few years, the Federal Government has taken initial steps to renew its commitment to Title VI implementation, compliance, and enforcement. However, the Federal Government has neither increased resources devoted to Title VI programs and activities nor clarified the extent of its commitment to enforcement.

Second, in 1984 the Supreme Court, in *Grove City College v. Bell,*[10] held that Title VI's nondiscrimination provision applied only to the particular program receiving Federal funds and not to the entire operations of the recipient institution. To reverse the effects of *Grove City,* Congress passed the Civil Rights Restoration Act of 1987[11] and clarified the definition of covered programs and activities to include the entire operation of a Federal funding recipient. Although the debates over *Grove City* and the Civil Rights Restoration Act created considerable confusion on the scope of Title VI coverage, the Federal agencies have made no effort to codify formally Congress' conclusive definition of covered programs and activities. Furthermore, the Federal agencies have failed to provide specific examples of the act's application to their programs or to explain the relationship of Title VI coverage to the fund termination remedy.

Third, beginning in the 1970s, the relationship between Federal and State authority over Federal financial assistance programs has changed dramatically. Increasingly, Congress has shifted responsibility for the administration of Federal financial assistance programs to State and local government agencies. In particular, Congress has consolidated several Federal financial assistance programs into formula-based, State-administered block grants. The reliance on State-administered Federal financial assistance programs has altered the nature of civil rights enforcement in these programs.

The increasing reliance on State-administered Federal financial assistance programs has altered the nature of civil rights enforcement in these programs. The change in funding mechanisms has tested the balance between State authority and the Federal Government's responsibility to protect constitutional and statutory rights and liberties that ensure participation in our democratic society. Under block grant programs and other continuing State programs, States, in effect, assume the same civil rights responsibilities over their subrecipients that the Federal agencies have over State recipient agencies.[12] This places the States in a position to monitor the distribution of block grant funding to their subrecipients; however, few consistent and effective Federal mechanisms exist to ensure that States sufficiently oversee and monitor the Title VI compliance activities of their subrecipients. The Federal agencies have not tracked the Federal funds or ensured the enforcement of Title VI by program recipients and subrecipients.

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[9] *See* U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort* (1970); U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—Seven Months Later* (May 1971); U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—One Year Later* (November 1971); U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—A Reassessment* (January 1973); U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974: To Extend Federal Financial Assistance*, 8 vols. (November 1975), vol. 6.

[10] 465 U.S. 555 (1984).

[11] Pub. L. No. 100–259, 102 Stat. 28 (codified as amended in scattered sections of U.S.C.).

Block grant funding requires Federal agencies to assume responsibility for overseeing and monitoring the State agencies to the same extent that the Department of Justice is required to oversee and monitor the Federal agencies. In programs in which a Federal agency provides financial assistance exclusively to State agencies rather than to direct recipients, the Federal agency's primary obligation is to oversee and monitor Title VI enforcement as conducted by the relevant State agency. For this reason, Federal agencies must evaluate the quality of Title VI enforcement efforts conducted by State recipients and provide assistance whenever necessary.

However, the Federal agencies have failed to oversee and monitor the State agencies to determine whether State enforcement activities ensure that the State's subrecipients are in compliance with Title VI. The Federal agencies have few consistent and effective mechanisms to ensure that States sufficiently oversee and monitor the Title VI compliance activities of their subrecipients. Furthermore, the Federal agencies have not tracked the Federal funds or ensured the enforcement of Title VI by program recipients and subrecipients. At a minimum, some Federal agencies conduct a cursory review of assurance forms and documents prepared and submitted by the States. However, none of the Federal agencies monitors Title VI compliance and enforcement activities of State agencies by reviewing racial and ethnic data and conducting onsite audits. Thus, the Federal agencies have neglected both their own compliance and enforcement responsibilities over their recipients and subrecipients, and their oversight and monitoring obligations over State primary recipients that administer and operate federally assisted programs.

The increased use of block grants also has created obstacles to effective enforcement of Title VI policies and procedures that the Federal Government has applied traditionally to its federally assisted programs. For example, because block grants are based on statutory formulas, the Federal agencies have little control over the distribution of funds. Consequently, block grant funding significantly limits the Federal agencies' ability to conduct preaward reviews of applicants, thus eliminating an important method for discovering and correcting discrimination before the Federal agencies release the funds. Despite the need to adopt policies and procedures designed specifically for ensuring Title VI compliance in block grant programs and other State continuing programs, the Department of Justice and the Federal agencies have failed to develop regulations, guidelines, and policies to address the deficiencies in the current implementation, compliance, and enforcement procedures.

In light of these three major developments, the Commission reexamined the Federal Title VI enforcement effort since 1975. The Commission conducted a comprehensive review of the Department of Justice's performance of its Title VI oversight and coordination responsibilities. In addition, through administration of a Title VI survey, document requests, and followup interviews and information requests, the Commission analyzed the Title VI enforcement efforts of 10 Federal agencies[13] and 10 subagencies.[14] This report presents the results of the Commission's study. The Commission makes extensive findings and recommendations for improving the Federal Title VI enforcement program. The Commission's major findings for the Department of Justice and for Federal funding agencies are summarized below.

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[12] State agencies that administer federally funded continuing programs have responsibility for establishing Title VI compliance programs for themselves and their recipients. *See* 28 C.F.R. § 42.410 (1994). Some continuing State programs, such as the community services and public health services programs administered by the Department of Health and Human Services, receive funding through block grants. *See* 45 C.F.R. Part 80, App. A. Pt. 2 (8), (21) (1994). *See also* 42 U.S.C. §§ 300w to 300w-9, 9901–9912 (1988 & Supp. V 1993).

## The U.S. Department of Justice's Oversight and Coordination of the Federal Title VI Enforcement Effort

The Department of Justice's (DOJ's) Coordination and Review Section (CORS), created in 1979 under the authority of the Assistant Attorney General for Civil Rights, is responsible for ensuring that Federal agencies meet their Title VI implementation, compliance, and enforcement obligations. Specifically, Executive Order 12,250, issued in 1980, gives DOJ authority to direct the Federal funding agencies in their Title VI implementation, compliance, and enforcement activities. However, DOJ has interpreted narrowly its authority under Executive Order 12,250 and its predecessors.

In addition, since 1965, DOJ has consistently placed a low priority on Title VI enforcement. DOJ has substantially reduced the resources available for its coordination and enforcement activities, such as developing and updating model Title VI enforcement regulations, policies, and procedures; monitoring the Title VI enforcement programs of the Federal agencies; and conducting liaison activities with the Federal agencies, community groups, and the public. DOJ reduced CORS' staff and resources, even though CRD as a whole benefited from budget and staff increases throughout the 1980s.[15] CORS' coordination and oversight activities were impeded further by the addition of major responsibilities, particularly under the Americans with Disabilities Act of 1990,[16] without a sufficient corresponding increase in staff or resources. Furthermore, CORS failed both to maximize the resources provided and defend its budget requests effectively. Thus, CORS' Title VI activities have decreased, because of consistent neglect by the Justice Department, diminished resources, and increased responsibilities for other civil rights laws.

DOJ's current Title VI coordination and oversight program fails in three major areas: development and review of regulations, policies, and procedures; oversight and evaluation of Federal agencies' Title VI enforcement efforts; and coordination and liaison activities. These comprise the essential elements of DOJ's Title VI compliance and enforcement responsibilities.

DOJ has abandoned attempts to develop coordinated Federal Title VI regulations, policies, and procedures. DOJ has neither updated its coordination regulations, produced a model regulation for the Federal agencies, dedicated resources to Title VI activities, nor issued guidelines or manuals to help Federal agencies understand and fulfill their responsibilities under Title VI.

DOJ's oversight of the Federal agencies' Title VI enforcement efforts is limited to review and comment on Civil Rights Implementation Plans—written reports submitted annually by the Federal agencies to DOJ. DOJ has not conducted other critical oversight activities, such as interagency civil rights surveys or onsite reviews of Federal agencies, in recent years. In addition, DOJ has not adequately fulfilled its oversight responsibilities in three areas: reviewing Federal agencies' letters of finding and decisions to terminate or suspend funds; facilitating delegation agreements among Federal agencies and between Federal agencies and State recipients; and providing litigation support, legal assistance, and policy interpretations to the Federal agencies.

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[13] These Federal agencies are: U.S. Department of Education, U.S. Department of Health and Human Services, U.S. Department of Agriculture, U.S. Department of Housing and Urban Development, U.S. Department of Labor, U.S. Department of the Interior, Environmental Protection Agency, Small Business Administration, Office of Justice Programs in the U.S. Department of Justice, and U.S. Department of Transportation.

[14] These are: the Food and Nutrition Service, Farmers Home Administration, and Soil Conservation Service in the Department of Agriculture; and the Federal Aviation Administration, Federal Highway Administration, Federal Railroad Administration, Federal Transit Administration, National Highway Traffic Safety Administration, Research and Special Programs Administration, and U.S. Coast Guard in the Department of Transportation.

[15] *See* table 3.1 below.

[16] Pub. L. No. 101–336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12,101–12,213 (Supp. V 1993)).

DOJ's failure to conduct effective coordination and liaison activities has resulted in a lack of commitment by Federal agencies to maintain a vigorous Title VI implementation, compliance, and enforcement program. DOJ has offered only limited technical assistance and training to the Federal agencies on Title VI. DOJ has conducted no outreach or education on Title VI and, until 1993, had not held any meetings with civil rights organizations to discuss their concerns about or seek their advice on Title VI coordination and enforcement activities. In the spring of 1995, DOJ reinstituted publication of the *Civil Rights Forum,* an important source of information on Title VI, in an effort to improve communications with Federal agencies, State and local government recipients, civil rights organizations, and the general public.

In 1995 the Assistant Attorney General for Civil Rights restructured CRD and created the Disability Rights Section to perform all disability-related civil rights enforcement activities. As a result, CORS was relieved of all responsibility for section 504 of the Rehabilitation Act of 1973[17] and the Americans with Disabilities Act of 1990. However, rather than increasing resources and staff hours devoted to Title VI coordination and enforcement in its 1995 restructuring of CRD, DOJ reduced drastically the size of CORS' staff. Out of approximately 30 positions in CORS, DOJ transferred 10 to the Disability Rights Section. In addition, DOJ intends to task CORS with conducting Title VI compliance and enforcement activities for all of DOJ's own federally assisted programs, responsibilities currently held by the Office of Justice Programs, the Federal Bureau of Investigations, and the Immigration and Naturalization Service. Thus, despite DOJ's stated intent to strengthen Title VI coordination, oversight, and enforcement and the need for agencywide Title VI coordination and guidance, DOJ is simultaneously increasing CORS' responsibilities and reducing both the stature and resources of the chief Federal Title VI civil rights oversight and enforcement office.

## The Federal Agencies' Title VI Enforcement Programs

Most Federal agencies continue to have glaring deficiencies in their Title VI implementation, compliance, and enforcement programs. The organizational structures of the Federal agencies do not promote effective civil rights enforcement. With the exception of the Department of Education, none of the Federal agencies has a comprehensive and proactive Title VI enforcement program to eliminate and prevent discrimination in each of the federally assisted programs it administers. The resources provided by the agencies are inadequate. In particular, the agencies do not have sufficient staff assigned to Title VI, and often the personnel assigned are not trained in civil rights enforcement. In addition, the Federal agencies do not conduct effective management planning of their civil rights activities and, therefore, do not use existing resources efficiently.

Generally, Federal agencies have neither promulgated new regulations, guidelines, and policies, nor updated their existing procedures to reflect the changing nature of Federal financial assistance programs and civil rights enforcement. Consequently, Federal agency staff, funding recipients, and program beneficiaries are afforded little guidance on the meaning and practical application of Title VI to the Federal agencies' programs. Furthermore, most Federal agencies do not conduct comprehensive and critical Title VI enforcement activities, such as preaward compliance reviews, postaward desk-audit reviews, and postaward compliance reviews. Few Federal agencies perform adequate public outreach and education or provide sufficient technical assistance on Title VI implementation and compliance. Only a few Federal agencies use data analysis in enforcing Title VI.

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[17] Pub. L. No. 93–112, title V, § 504 87 Stat. 394 (codified as amended at 29 U.S.C. § 794 (1988 & Supp. V 1993)).

Finally, despite Congress' increasing reliance on block grant programs and other continuing State programs to fund and administer federally assisted programs, most Federal agencies have not instituted adequate mechanisms to ensure that the relative responsibilities of the Federal agencies and the States are clear and coordinated, and that Title VI is enforced effectively in State-administered programs.

## Organizational Structure

Some Federal agencies have centralized civil rights offices that conduct all civil rights compliance and enforcement activities. Some agencies have a headquarters office directing the civil rights program with regional offices executing most of the day-to-day enforcement activities. Other agencies have decentralized civil rights enforcement structures, with most of the responsibility for civil rights enforcement delegated to the agencies' operating administrations. Regardless of the structure, Federal agencies must organize their civil rights enforcement offices to promote uniform and comprehensive Title VI implementation, compliance, and enforcement and to ensure that civil rights enforcement is integrated into the strategic planning for the entire agency.

Few Federal agencies have an organizational structure that fosters effective Title VI implementation, compliance, and enforcement. Only one of the Federal agencies reviewed—the Department of Education—has an organizational structure meeting all necessary criteria for an effective Title VI enforcement program. These criteria include:

- organizational placement of the primary civil rights office to ensure primacy within the agency;
- organizational and managerial links between the primary civil rights office and the regional and field offices;
- sufficient authority for the primary civil rights office to enforce Title VI in the agency programs;
- separation of internal civil rights functions from external civil rights functions and Title VI enforcement responsibilities;
- coordination between the primary civil rights office and program offices; and
- a unit within the primary civil rights office devoted exclusively to policy development and a unit devoted to enforcement planning.

In several of the Federal agencies reviewed, civil rights enforcement is perceived as a priority program because the director of the civil rights office reports directly to the head of the agency. However, in the other Federal agencies, the head of the civil rights office is several levels removed from the agency's director, and further removed than the agency's program offices. This may impair the office's ability to influence important executive-level planning and decisions on funding and staff resources devoted to Title VI civil rights implementation, compliance, and enforcement responsibilities.

For agencywide civil rights enforcement efforts to achieve nondiscrimination in federally assisted programs, effective organization within an agency's primary civil rights office is critical. However, with the exception of the Office for Civil Rights at the Department of Education, no agency's headquarters civil rights office has an adequate internal structure to ensure effective civil rights enforcement. Few civil rights offices have a policy unit or legal staff to provide legal and policy support to their Title VI program; a planning unit to ensure that the agency funds and manages its civil rights activities effectively; or a data analysis unit to assist the agency in maintaining a database and conducting civil rights analyses necessary for effective Title VI implementation, compliance, and enforcement.

Some Federal agencies separate internal and external civil rights enforcement functions, either by placing them in different offices, or by dividing one office into separate units with distinct functions and supervisory staff. However, many Federal agencies do not separate the functions. In most of these Federal agencies, civil rights staff are "generalists" without specific experience or training in external civil rights enforcement. These Federal agencies' Title VI enforcement efforts suffer because staff are inexperienced and lack comprehensive knowledge of Title VI implementation, compliance, and enforcement. In addition, these Federal agencies operate without organizational protections, such as a separate budget allocation and staff designated specifically for external civil rights, to ensure that Title VI and other external civil rights responsibilities are not sacrificed to fulfill internal civil rights obligations.

Many Federal agencies delegate primary responsibility for day-to-day civil rights enforcement activities to civil rights staff operating in the Federal agencies' regional offices and reporting to regional directors, rather than to the head of the civil rights office. Several Federal agencies delegate key civil rights implementation and enforcement responsibilities to program office staff, who neither report to the head of the agency's civil rights office nor have adequate civil rights enforcement expertise. Such arrangements impede efficient operation and direction of Title VI enforcement activities, especially if the regional director is accountable only for programmatic operations and not for civil rights activities performed by regional and field staff.

Three of the Federal agencies reviewed—the Department of Agriculture, the Department of the Interior, and the Department of Transportation—have decentralized civil rights enforcement programs. Although the primary civil rights offices within these Federal agencies have some direct Title VI enforcement responsibilities, for the most part, civil rights offices within subagencies have the responsibility for performing most Title VI enforcement activities. The primary civil rights offices are responsible for ensuring that the subagencies perform their Title VI enforcement duties effectively. However, the primary civil rights offices have little, if any, direct authority over the headquarters or regional civil rights offices in the subagencies. Furthermore, none of the primary civil rights offices actively monitors and evaluates the subagencies' execution of their Title VI responsibilities or provides guidance to the subagencies to ensure uniform and comprehensive Title VI implementation and enforcement in all agency funding programs. The failure of the primary civil rights offices to monitor and evaluate the subagencies' Title VI activities has resulted in inconsistent and ineffective enforcement efforts.

## Budget, Staffing, Workload, and Civil Rights Planning

Each agency is responsible for ensuring that its civil rights office has adequate budgetary and staff resources to meet its responsibilities. Furthermore, each civil rights office is responsible for planning its civil rights activities to maximize effectively and efficiently the limited resources available for Title VI implementation, compliance, and enforcement. With the exception of the Department of Education, none of the Federal agencies evaluated in this report has implemented an information management and planning system sufficient to meet these obligations. The Federal agencies do not prepare annual civil rights enforcement plans that outline goals and objectives, specify timeframes for their achievement, and list allocations of staff and budgetary resources for their accomplishment. The Civil Rights Implementation Plans that Federal agencies submit to the Department of Justice are too general and often too incomplete to serve as civil rights enforcement plans.

Furthermore, Federal agencies' budget and staffing for Title VI implementation and enforcement activities have declined as their civil rights workload has increased. As a result, few Federal agencies devote sufficient resources to Title VI to ensure that the agency and its recipients are in compliance with Title VI's nondiscrimination provision. Generally, the Federal agencies have failed to conduct meaningful analyses of their resources in relation to their workload. The agencies do not prepare adequate planning documents to improve the efficiency of their operations and justify requests for increases in budget and staffing.

## Regulations, Guidelines, Policies, and Procedures

Comprehensive and updated Title VI regulations, guidelines, policies, and procedures are an essential foundation for an effective Title VI enforcement program. Without them, Federal agency staff, funding recipients, program participants, intended beneficiaries, and the public do not have the detailed understanding of Title VI's practical application to an agency's programs that is necessary for ensuring compliance with Title VI. However, most Federal agencies have not updated their Title VI regulations in at least 10 years, and they have not included critical provisions necessary for ensuring recipients' compliance with Title VI. Furthermore, Federal agencies have failed to develop and issue guidelines, policies, and procedures concerning Title VI compliance and enforcement.

Most Federal agencies have adequate Title VI regulations patterned after the regulations of the Department of Education, formerly the Department of Health, Education, and Welfare. However, few Federal agencies have tailored their regulations to address their own federally assisted programs. Furthermore, the regulations require updating to reflect recent Title VI developments, such as the Civil Rights Restoration Act of 1987 and the changing nature of Federal financial assistance programs. Finally, most Federal agencies do not regularly update the appendix to their regulations that lists their federally funded programs subject to Title VI.

No agency has Title VI guidelines for each of its federally assisted programs, as required by the Department of Justice. With the exception of the Department of Education, the Federal agencies generally do not issue regular policy statements interpreting Title VI requirements, addressing the implications of Title VI developments, and clarifying and describing the application of Title VI to their federally funded programs. Although many Federal agencies have not developed procedural manuals, some Federal agencies have comprehensive, but outdated, manuals detailing their procedures for complaint investigations, compliance reviews, and data collection and analysis.[18]

## Critical Title VI Enforcement Activities

An effective Title VI implementation, compliance, and enforcement program demands that Federal agencies pursue actively a number of key enforcement activities. However, all of the Federal agencies have failed to utilize two important enforcement mechanisms: preaward reviews and postaward desk-audit reviews. They also do not allocate sufficient resources to important proactive Title VI compliance activities: community outreach and public education, and technical assistance.

### Preaward Reviews

Preaward reviews can serve two useful purposes. First, preaward reviews enable a Federal agency to uncover technical deficiencies in an applicant's program or Title VI assurance form before it disburses funds. Second, a Federal agency can utilize preaward reviews to determine whether an applicant's program is accessible to all communities and, therefore, in compliance with Title VI. Some Federal agencies use preaward reviews, in a limited way, to review assurance forms and to discover technical deficiencies, but none of the Federal agencies uses preaward reviews to determine whether all recipients are in compliance with Title VI prior to distributing Federal funds. Some agencies conducting preaward reviews perform only cursory reviews or conduct preaward reviews on applicants for only selected federally assisted programs, such as the Department of Labor under its Job Training Partnership Act.

Because most Federal agencies fail to utilize preaward reviews as a Title VI compliance mechanism, they disburse billions of dollars of Federal financial assistance with no meaningful assurance that the recipients of such funds are in compliance with Title VI and that the recipients' federally funded programs operate in a nondiscriminatory manner.

### Postaward Desk-Audit Reviews

Postaward desk-audit reviews are a valuable enforcement mechanism underutilized by Federal agencies, to the detriment of their Title VI enforcement programs. None of the Federal agencies reviewed has an active postaward desk-audit review system for detecting potential violations of Title VI. Given the limited resources available for Title VI compliance and enforcement activities, the Federal agencies should utilize postaward desk-audit reviews as a cost-effective means of evaluating recipients' compliance status. The failure of the Federal agencies to utilize these reviews reflects a mismanagement of the scarce resources allocated for civil rights compliance and enforcement.

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[18] Department of Housing and Urban Development and Small Business Administration.

### Postaward Onsite Compliance Reviews

Unlike postaward desk-audit reviews, virtually every agency with a Title VI enforcement program conducts onsite compliance reviews. Nearly all Federal agencies regard onsite compliance reviews, along with complaint investigations, as their primary enforcement mechanism. Nevertheless, as available resources have declined, most Federal agencies have curtailed substantially the number of onsite compliance reviews they complete annually. As a result, most Federal agencies conduct onsite compliance reviews on only a small proportion of their recipients.

### Complaint Investigations

Most Federal agencies regard complaint investigations as a primary mechanism for enforcing Title VI. Several Federal agencies, such as the Department of Education and the Department of Health and Human Resources, receive so many complaints annually that they expend the bulk of their resources on complaint investigation, to the detriment of other critical Title VI implementation, compliance, and enforcement activities. In general, these Federal agencies attempt to resolve complaints quickly and, consequently, perform only cursory investigations. However, other Federal agencies receive few Title VI complaints, an indication that their outreach and education efforts have failed to inform the public of their rights under Title VI.

### Outreach and Education and Technical Assistance

Active community outreach, public education, and technical assistance programs are essential to comprehensive Title VI compliance and enforcement. Without these programs, actual and potential program participants and beneficiaries may remain unaware of their rights under Title VI, unable to determine whether their rights have been violated, and inadequately informed to file Title VI complaints. In addition, without these programs, recipients remain uninformed of their specific obligations under Title VI. Despite the importance of these functions, only two agencies reviewed, the Departments of Education and Labor, perform these key proactive compl[illegible] functions on a regular basis.

## Reporting Requirements and Data Collection and Analysis

Effective Title VI enforcement requires Federal agencies to collect and analyze data from applicants and recipients on a regular basis to determine whether recipients conduct their programs in a nondiscriminatory manner. Federal agencies should review the data to ensure that their federally funded programs benefit all segments of the population and have no adverse or disparate impact on minorities. None of the Federal agencies adequately collects, analyzes, or uses applicants' and recipients' program data for the purposes of Title VI enforcement. In fact, most of the agencies reviewed do not collect or review data from their recipients. Although some Federal agencies do collect data from recipients and use that data in determining recipients' Title VI compliance status, none indicated that it uses data when allocating funds to ensure that programs do not impact disparately upon beneficiaries and participants of different races or ethnicities.

## Oversight of Continuing State Programs

Most Federal agencies dispense a large proportion of their program funds through continuing State programs, including block grant programs. Under these programs States assume certain Title VI compliance responsibilities. At a minimum, a State must submit assurances stating that it is in compliance with Title VI. It also must provide methods of administration demonstrating how it will ensure compliance by subrecipients. None of the Federal agencies reviewed provides State recipients comprehensive guidance on their responsibilities or monitors effectively States' Title VI compliance efforts.

Although all Federal agencies' regulations include provisions requiring States to submit methods of administration, the Federal agencies do not provide the States with guidance on their methods of administration. In addition, they do not routinely require States to submit methods of administration; they do not review the methods of administration submitted; and they do not monitor States' adherence to their methods of administration. Thus, the Federal agencies have abandoned their responsibility to oversee and monitor States' compliance programs.

### Staff Training

Given that Federal agencies have undergone staffing reductions, it is essential that they maximize the effectiveness of their existing staffs. In particular, they should ensure that their staffs are thoroughly and regularly trained in Title VI enforcement, other civil rights requirements, and the agencies' funding programs. However, the Federal agencies reviewed in this report have not provided their staffs with adequate training to implement their responsibilities. No agency provides regular, formal, or comprehensive training on Title VI implementation, compliance, and enforcement obligations. In addition, few agencies provide systematic civil rights training of any kind. Therefore, the Federal agencies' staffs operate without the degree of expertise on or comprehensive knowledge of Title VI and other civil rights laws necessary to enforce nondiscrimination provisions consistently and effectively.

## Conclusion

Federal Title VI enforcement programs at the Department of Justice and the Federal agencies have extensive deficiencies. Currently, the Department of Justice relies exclusively on the insufficient and often inaccurate information contained in the Federal agencies' Civil Rights Implementation Plans.

The Federal agencies have devoted their efforts to other civil rights statutes, such as Title VII of the Civil Rights Act of 1964, section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990, and reduced drastically the resources available for implementing and enforcing Title VI in their federally assisted programs. With the exception of the Department of Education, none of the Federal agencies responsible for enforcing Title VI has an effective Title VI enforcement program. The Federal agencies do not conduct essential Title VI enforcement activities, such as preaward and postaward reviews of recipients, collection and analysis of civil rights data, and public outreach and education on Title VI.

Federal financial assistance programs administered in block grants present challenging civil rights enforcement problems. State and local government agencies that operate and administer federally assisted programs need sufficient resources and trained staff to ensure that their subrecipients are in compliance with Title VI. In turn, the Department of Justice must establish regulations, policies, or guidance to respond to the changing nature of Federal financial assistance programs. The Department of Justice also needs to ensure that the Federal agencies conduct programs designed to secure compliance with Title VI by their governmental and nongovernmental primary recipients and subrecipients. Moreover, when the Federal agencies rely on primary State recipients to ensure that their subrecipients comply with Title VI, the Federal agencies must monitor or oversee the activities of their State recipients.

This report contains numerous, detailed recommendations that must be implemented by the President, Congress, the Department of Justice, and the Federal agencies to ensure uniform, comprehensive, and meaningful enforcement of Title VI. Implementing these recommendations will guarantee that federally assisted programs are free of discrimination based upon race, color, or national origin.

## Chapter 1

# Introduction

On July 2, 1964, Congress enacted the Civil Rights Act of 1964[1]—the most comprehensive civil rights legislation since Reconstruction.[2] The act represented Congress' response to growing public demand for equality for Americans of all races. Although less sweeping than its proponents had advocated, the Civil Rights Act embodies significant civil rights provisions aimed at eradicating racial discrimination. Title II of the Civil Rights Act prohibits discrimination in public accommodations;[3] Title III forbids segregation in public facilities;[4] Title IV proscribes segregation in public schools;[5] Title VI prohibits discrimination in all federally funded programs and activities;[6] and Title VII prohibits discrimination in employment based on race, color, religion, sex, or national origin.[7] Together, these provisions function to promote equality of opportunity in virtually all areas of our national life. Despite passage of the act and its nondiscrimination provisions, discrimination remains a barrier to the full enjoyment of constitutional and civil rights and liberties.

One provision of the Civil Rights Act offers protection to numerous individuals excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under federally funded programs or activities. That provision, Title VI of the Civil Rights Act, serves to prohibit discrimination on the basis of race, color, or national origin under any program or activity receiving Federal financial assistance. Because of the broad scope of Title VI, its enforcement by the Federal Government can serve to ensure nondiscrimination in many aspects of American life. This report focuses on the overall effort by the Federal Government to enforce Title VI.

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[1] Pub. L. No. 88–352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

[2] Reconstruction was the post-Civil War period when Presidents and Congress sought to facilitate the political, social, and economic rebuilding of the Nation after the war. In 1863, President Lincoln issued a proclamation outlining an initial Reconstruction plan that included elements to address the needs of newly freed black citizens. For example, the plan facilitated the establishment of the Freedmen's Bureau that provided food and medical assistance to black and white citizens recovering from the war, and helped resettle individuals displaced during the war. It also assisted many black citizens in their efforts to remain independent and self-sufficient, and it established and supervised schools, courts, and boards of arbitration to ensure that black citizens received education and fair treatment in the judicial system and workplace. Congress later assumed control of Reconstruction efforts and passed a civil rights bill in 1866, to guarantee the civil rights of black citizens. In the Reconstruction Act of 1867, Congress required Southern States to ratify the 14th amendment to the Constitution as a condition of admittance to the Union. That amendment guaranteed equal protection under the law and clearly defined citizenship to include the newly freed black citizens. Congress also enacted the 15th amendment during Reconstruction and extended the right to vote to black citizens. *See* John Hope Franklin and Alfred A. Moss, Jr., *From Slavery to Freedom: A History of African Americans* (New York: Alfred A. Knopf, Inc., 1994), pp. 220–46.

[3] 42 U.S.C. § 2000a (1988).

[4] *Id.* § 2000b.

[5] *Id.* § 2000c.

[6] *Id.* § 2000d.

[7] *Id.* § 2000e.

# Title VI of the Civil Rights Act of 1964

## Title VI Scope and Application

Title VI of the Civil Rights Act ensures that public funds are not used to further racial discrimination in Federal programs or activities.[8] Title VI is designed to eradicate racial and ethnic discrimination in such programs and activities, not to penalize the recipients of Federal funds who administer the programs.[9] Title VI provides that:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[10]

Congress intended Title VI to cover a broad range of activities, including "programs for schools, highways, hospital construction, farm price supports, depressed areas, housing, urban renewal, vocational education, ship and airline subsidies, disaster relief, civilian defense, school lunches, and public health."[11] In 1974, the U.S. Commission on Civil Rights (Commission) noted that:

> Federal financial assistance extends into every area of our national life. It affects the lives of most of the population and plays a vital role in the social and economic well-being of the country. Federal assistance, for example, has helped to build hospitals and provide health care, to construct airports and highways, to revitalize urban areas and aid them in accomplishing orderly growth, to provide housing, to improve education and recreation facilities, and to assist economically disadvantaged individuals and communities. Federal assistance has also provided foster care for children and assisted surviving spouses of veterans killed in war to further their education. Therefore, it is evident that the duty incumbent on Federal agencies to eliminate discrimination in all such programs and activities is a pervasive one, reaching practically every sector and institution of society. *Title VI is, thus, the broadest instrument available for the nationwide elimination of invidious discrimination and the effects of discrimination on the basis of race or national origin.*[12]

Title VI remains the broadest instrument available to eliminate racial and ethnic discrimination. Title VI applies to approximately 27 Federal agencies administering more than 1,000 programs[13] and distributing annually an estimated $900 billion in Federal financial assistance.[14]

Title VI has received greater public attention in the 1990s. In September 1993, for the first time in its history, the Department of Housing and Urban Development (HUD) assumed the functions of the Orange County Housing Authority in Vidor, Texas, because the local housing authority failed to comply with the antidiscrimination provisions of Title VI.[15] HUD acted in response to the housing authority's failure to create a safe and secure environment for all people, particularly its failure to remedy the racial harassment and racially hostile environment in Vidor Village, a federally assisted public housing development.[16] HUD based its takeover on a determination that the authority was in "substantial breach and substantial default" on its 36-year-old contract with HUD.[17] In accordance with a Federal desegregation order under Title VI, in January 1994, HUD initiated its plans to integrate Vidor Village and 69 other public housing developments in 36 east Texas counties.[18]

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[8] 110 Cong. Rec. 6544 (1964)(statement of Senator Humphrey).

[9] *Id.*

[10] *Id.* § 2000d (1988).

[11] Bureau of National Affairs, *Operational Manual: The Civil Rights Act of 1964* (1964), p. 93.

[12] U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974: To Extend Federal Financial Assistance*, 8 vols. (November 1975), vol. 6, p. 3 (emphasis added).

[13] *See* Office of Management and Budget and U.S. General Services Administration, *1993 Catalog of Federal Domestic Assistance* (Superintendent of Documents: Washington, D.C., 1993).

[14] Bob McArthur, Chief, Federal Programs, U.S. Bureau of the Census, U.S. Department of Commerce, telephone interview, Feb. 9, 1995.

[15] *Intimidation of Blacks at Texas Housing Project Prompts HUD Takeover*, 1 Fair Housing–Fair Lending (P-H) vol. 9, no. 5, ¶ 5.3, p. 4 (Nov. 1, 1993).

In addition, there has been increasing public recognition that residents of minority and low-income communities are bearing a disproportionate share of environmentally related health risks.[19] For example, in 1983, the General Accounting Office (GAO) concluded that three out of four commercial hazardous waste sites in the southeastern United States are located in predominantly African American communities.[20] This disproportionate burden has mobilized minority and low-income communities to organize to achieve "environmental justice."[21] On February 11, 1994, in response to these concerns, President William J. Clinton issued Executive Order 12,898, entitled "Federal Actions to Address Environmental Justice to Minority Populations and Low-Income Populations."[22] Using language similar to that in Title VI, Executive Order 12,898 directs each Federal agency to:

> conduct its programs, policies, and activities that substantially affect human health or the environment, in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under, such programs, policies, and activities, because of race and national origin.[23]

The order further directs all Federal agencies to develop "environmental justice" strategies in conjunction with an Interagency Working Group, under the leadership of the Administrator of the Environmental Protection Agency, and to collect, analyze, and disseminate information about the health impact of their programs, policies, and activities, by race, national origin, or income.[24]

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[16] Ibid.

[17] U.S. Department of Housing and Urban Development, "HUD Seeks Resignation of Vidor-area Public Housing Officials in Wake of Recent Racial Strife and Harassment," HUD press release, HUD No. 93–78, Sept. 14, 1993.

[18] U.S. Department of Housing and Urban Development, "HUD Helps Families Move into Formerly All-White Vidor, Texas, Public Housing," HUD press release, HUD No. 94–10, Jan. 13, 1994. In response to a class action suit that has been in litigation for over 14 years, HUD filed a desegregation plan with a Federal district court to ensure compliance with Title VI. *See* Young v. Cisneros, Civil Action No. P–80–8–CA (E.D. Tex. Feb. 3, 1994)(notice of filing and desegregation plan).

[19] *See* Commission for Racial Justice, United Church of Christ, *Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites* (1987). Using 1980 census data, the study examined 415 operating commercial hazardous-waste facilities and found that race was the most significant factor associated with the location of the facilities. In addition, the study examined communities surrounding 18,164 uncontrolled toxic waste sites (UTWSs) and found that 3 out of 5 African Americans and Hispanic Americans lived in communities with UTWSs. Ibid. *See also* John C. Chambers and Alyssa Senzel, "Our Racist Environment: Discrimination Leaves Mark in Site Choices," *National Law Journal*, Sept. 12, 1994, p. S27. "Unequal Protection: The Racial Divide in Environmental Law," *National Law Journal*, Sept. 21, 1992, p. S1.

[20] U.S. General Accounting Office, *Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities*, Rept. No. RCED–83–168 (June 1, 1983).

[21] *See* James H. Colopy, *The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 Stan. Env. L.J. 125, 126–29 (1994).

[22] Exec. Order No. 12,898, 30 Weekly Comp. Pres. Doc. 276 (Feb. 14, 1994); Memorandum on Environmental Justice, 30 Weekly Comp. Pres. Doc. 279 (Feb. 14, 1994).

[23] Exec. Order No. 12,898, § 2–2, 30 Weekly Comp. Pres. Doc. 276, 277 (Feb. 14, 1994).

[24] *Id.* at 276.

The similarities between Executive Order 12,898 and Title VI are likely to increase the prominence of Title VI enforcement in the area of "environmental justice."

This report addresses the application of Title VI to current, discriminatory barriers restricting access to and participation in federally funded programs and activities.

## Title VI Implementation, Compliance, and Enforcement

With the passage of Title VI, Congress required Federal agencies to "demolish the lingering barriers to full participation faced by minorities"[25] in federally funded activities and programs. Consequently, each agency has primary and ultimate responsibility for enforcement of nondiscrimination in its Federal financial assistance programs. That responsibility encompasses reactive duties, such as investigation and handling of complaints of discrimination and imposition of sanctions, as well as proactive obligations to ensure continuing compliance with Title VI and adequate understanding of its rights and responsibilities. According to a 1966 Commission Title VI *Compliance Officer's Manual*:

> This responsibility must be exercised positively, not merely reactively, in response to complaints of discrimination. Regular inspections and reviews are necessary to ensure that recipients are meeting the requirements of Title VI. The ultimate success of Title VI depends largely on how effectively compliance is monitored in the field.[26]

To coordinate the Title VI enforcement activities of Federal agencies, Congress vested the President with the authority to approve all rules, regulations, and orders issued by the agencies.[27] Over the past 30 years, the President has delegated his Title VI coordination functions to the Attorney General in a series of Executive orders.[28] In November 1980, President Jimmy Carter issued Executive Order 12,250. The order expands the Attorney General's responsibility from coordination in agency Title VI enforcement and directs the Attorney General to oversee and coordinate the implementation and enforcement responsibilities of the Federal agencies.[29] To fulfill its responsibilities under Executive Order 12,250, the U.S. Department of Justice (DOJ) issued coordination regulations describing the specific implementation, compliance, and enforcement obligations of Federal funding agencies under Title VI.[30]

This report assesses the extent to which the Attorney General and the Federal agencies are fulfilling their civil rights implementation and enforcement responsibilities under Title VI and Executive Order 12,250.

## A History of Inadequate Federal Enforcement of Title VI

In 1970 the Commission performed its first full evaluation of the Federal Title VI enforcement effort. In its report, *The Federal Civil Rights Enforcement Effort*,[31] the Commission studied various Federal agencies' civil rights implementation and enforcement efforts pursuant to Title VI. It also examined DOJ's coordination role with respect to those efforts. The report concluded that, generally, "Title VI [had] failed to match the law's promise. . . . The mechanisms developed by Federal agencies with Title VI responsibilities [had] glaring deficiencies. . . . In addition, there [were] inconsistencies in the ways agencies view[ed] the scope of their responsibilities under Title VI."[32] In particular, the Commission attributed the overall deficiency in Title VI enforcement to insufficient staff and staff training, the low organizational status of the agency officials in charge of enforcing Title VI, the low priority placed on Title VI responsibilities, ineffective mechanisms for monitoring and securing compliance, minimum reliance on compliance reports, and an overall passive approach to implementation and enforcement.[33] The Commission also concluded that DOJ had "consistently failed to devote adequate manpower or resources to the task."[34] DOJ's Title VI coordination efforts suffered from inconsistent communication with other agencies and a narrow view of its Title VI responsibilities.[35]

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[25] U.S. Commission on Civil Rights, *Federal Civil Rights Commitments and Assessments of Enforcement Resources and Performance* (November 1983), p. 2.

[26] U.S. Commission on Civil Rights, *Compliance Officer's Manual: A Handbook of Compliance Procedures under Title VI of the Civil Rights Act of 1964* (October 1966), p. 3.

[27] 42 U.S.C. § 2000d-1 (1988).

[28] *See* Exec. Order No. 11,247, 3 C.F.R. 348 (1964–1965), *superseded by*, Exec. Order No. 11,764, 3 C.F.R. 849 (1971–1975), *revoked by* Exec. Order No. 12,250, 3 C.F.R. 298 (1981), *reprinted in* 42 U.S.C. § 2000d-1 (1988).

[29] Exec. Order No. 12,250, §§ 1–101, 1–201, 3 C.F.R. 298 (1981), *reprinted in* 42 U.S.C. § 2000d-1 (1988). In addition to Title VI, the Attorney General oversees and coordinates the nondiscrimination provisions of Title IX of the Education Amendment of 1972, 20 U.S.C. §§ 1681–1688 (1988), and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988 & Supp. V 1993). The Attorney General's oversight and coordination responsibilities are administered by the Coordination and Review Section (CORS) of the Civil Rights Division at the U.S. Department of Justice (DOJ).

[30] 28 C.F.R. §§ 42.401–42.415 (1994). For a detailed discussion of DOJ's coordination regulations, see chap. 3, pp. 72–77 and chap. 4, pp. 160–65.

In 1971 the Commission reexamined Title VI enforcement in *The Federal Civil Rights Enforcement Effort—Seven Months Later*[36] and *The Federal Civil Rights Enforcement Effort—One Year Later*.[37] In each of those reports, the Commission again evaluated the efforts of various major Federal agencies and the coordination role of DOJ. In the first followup report, the Commission found "no marked improvement in agency commitment of resources to their Title VI efforts."[38] For example, the agencies still had vacancies in Title VI compliance staff.[39] In addition, the agencies failed to establish uniform policies regarding the collection and use of racial and ethnic data from recipients.[40] Moreover, DOJ continued to rely completely on intermittent and improvised agency liaison efforts, instead of designing consistent and affirmative procedures to ensure effective administrative enforcement of Title VI.[41]

In its second followup report, the Commission found that although a few agencies showed some improvements, many had done nothing to fulfill their Title VI responsibilities.[42] Overall, the Commission cited agencies for "grossly inadequate performance."[43] The Commission found that, with respect to all civil rights laws, the enforcement efforts of more than 40 Federal agencies with significant civil rights responsibilities were characterized by inaction, lack of coordination, and indifference. The deficiencies found were "so extensive as virtually to nullify the impact of the important civil rights laws enacted over the last decade and to make a mockery of the efforts of the many men and women who [had] fought for civil rights."[44] The Commission concluded that the Federal agencies' Title VI staffs were too small, their enforcement efforts too weak, their review mechanisms poor, and their implementation policies and standards unclear.[45] In addition, DOJ itself had failed to take adequate steps to fulfill its coordination responsibilities, particularly by failing to devote staff, develop a management plan, and take an affirmative posture with respect to the funding agencies.[46]

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[31] U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort* (1970) (hereafter cited as *1970 Enforcement Effort*).

[32] Ibid., p. 805.

[33] Ibid., pp. 805–06.

[34] Ibid., p. 806.

[35] Ibid.

[36] U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—Seven Months Later* (May 1971) (hereafter cited as *Seven Months Later*).

[37] U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—One Year Later* (November 1971) (hereafter cited as *One Year Later*). In 1971, The Commission also reissued its 1970 report. *See* U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort* (1971).

[38] *Seven Months Later*, pp. 55–56.

[39] Ibid., p. 55.

[40] Ibid., p. 56.

[41] Ibid., pp. 59–60.

[42] *One Year Later*, p. 113.

In 1973 the Commission issued another report addressing Title VI compliance efforts, *The Federal Civil Rights Enforcement Effort—A Reassessment*.[47] In that report, the Commission found few changes since 1970. The Federal civil rights efforts were entirely inadequate; agencies lacked sufficient staff and authority; and there existed an overall failure to enforce Title VI systematically and affirmatively.[48]

The Commission revisited the civil rights enforcement efforts of Federal agencies with Title VI responsibilities in 1974. In its report, *The Federal Civil Rights Enforcement Effort*,[49] the Commission concluded that, largely because of inadequate governmentwide leadership, Federal agencies' efforts to enforce Title VI had been futile. The Commission determined that:

> Most Federal agency Title VI offices were understaffed, lacked sufficient authority to execute their responsibilities, did not require the necessary data for measuring Title VI compliance, and conducted too few preaward and postaward reviews; where Title VI violations were uncovered, they were often not fully remedied.[50]

Other organizations have monitored Federal enforcement of Title VI and found it inadequate. In 1980 the General Accounting Office (GAO) reported similar conclusions in its report to Congress.[51] In presenting survey results to the House Subcommittee on Civil and Constitutional Rights, the Director of the Human Resources Division of GAO noted that many responding agencies were unclear about which activities were covered by Title VI:

> Neither the Department of Justice nor many Federal agencies with assistance programs subject to Title VI

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[43] Ibid., p. 130.

[44] Ibid., p. II.

[45] Ibid., pp. 135, 144, 146, 155, 159, 167.

[46] Ibid., pp. 115, 123.

[47] U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—A Reassessment* (January 1973) (hereafter cited as *Reassessment*).

[48] Ibid., p. iii (transmittal letter).

[49] U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974: To Extend Federal Financial Assistance*, 8 vols. (November 1975), vol. 6.

[50] Ibid., p. iv (transmittal letter).

[51] U.S. General Accounting Office, *Agencies When Providing Federal Financial Assistance Should Ensure Compliance with Title VI*, Rept. No. 112,063 (Apr. 15, 1980).

> had effectively implemented Title VI requirements. To resolve these problems, Justice needed to clarify its regulations and monitor agency enforcement.[52]

GAO found that Federal agencies failed to prepare Title VI implementation regulations and guidelines, thereby demonstrating indifference towards their Title VI responsibilities.[53] Overall, agencies were not complying with DOJ's Title VI implementation and enforcement requirements.[54]

In addition, in 1980, immediately after execution of Executive Order 12,250, the Coordination and Review Section (CORS) of DOJ's Civil Rights Division conducted a survey of the Title VI enforcement efforts of approximately 25 Federal agencies. CORS identified several major problems.[55] First, CORS found that agencies had not given their Title VI offices sufficient authority to enforce Title VI in each agency's federally funded programs. Second, agencies placed their Title VI offices in positions subordinate to the offices administering the agencies' programs, thereby compromising the independence of the Title VI offices. Third, agencies had failed to devote sufficient staff to enforce Title VI. Fourth, either agencies failed to collect adequate recipient compliance data or such data were not available to Title VI compliance officers. Fifth, CORS found that agencies, especially decentralized agencies, did not manage their Title VI enforcement programs effectively. Specifically, Title VI offices did not engage in adequate planning. Finally, agencies did not have updated regulations, enforcement manuals, procedures, and guidelines. Consequently, the "structure upon which their Title VI enforcement program [was] founded [was] unsound."[56]

In 1992 the Commission reviewed the Title VI enforcement program of the Federal Aviation Administration of the Department of Transportation (DOT).[57] The Commission concluded that Title VI enforcement at DOT lacked leadership and direction.[58] The report also revealed that Title VI civil rights enforcement, in general, was neither a priority nor an integral part of DOT's primary mission:[59]

> The Secretary of Transportation had delegated authority to the eight modal administrations to enforce certain civil rights laws and programs, but had failed to monitor and assess aspects of enforcement such as budget, staff resources, compliance reviews, and complaint investigation. As a direct consequence, civil rights enforcement at the departmental level and within at least one modal administration, the Federal Aviation Administration, was grossly underfunded.[60]

The Commission continues to receive indications that DOJ and the responsible Federal agencies are not enforcing adequately Title VI.

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[52] Gregory J. Ahart, Director, Human Resources Division, U.S. General Accounting Office, prepared statement before the Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, U.S. House of Representatives, 96th Cong., Apr. 15, 1980, pp. 3–4.

[53] Ibid., p. 6.

[54] Ibid., p. 7.

[55] U.S. Department of Justice, Civil Rights Division, "Title VI—Fifteen Years Later . . . ," *Title VI Forum*, vol. 4, no. 2 (Fall 1979).

[56] Ibid., pp. 8–9. In a report published in April 1984, one organization, the Advisory Commission on Intergovernmental Relations, ranked Title VI as the ninth most burdensome Federal mandate imposed upon State and local governments. "Burdensome Mandates: ACIR's Top 10," *The National Journal*, Aug. 4, 1984, p. 1467.

[57] U.S. Commission on Civil Rights, *Enforcement of Equal Employment and Economic Opportunity Laws and Programs Relating to Federally Assisted Transportation Projects* (January 1993).

[58] Ibid., p. 13.

[59] Ibid.

[60] Ibid., p. 13.

## Barriers to Effective Implementation, Compliance, and Enforcement of Title VI

Title VI's long history of inadequate enforcement is but one motivation for the Commission's study of the Federal Title VI enforcement effort. A number of developments have presented new issues in Title VI enforcement since the Commission last examined Title VI.

### The Effect of Other Civil Rights Statutes on Title VI

In the 30 years since the passage of Title VI, Congress has enacted several other civil rights statutes. Among the more prominent are Title IX of the Education Amendment of 1972,[61] section 504 of the Rehabilitation Act of 1973,[62] and the Americans with Disabilities Act of 1990.[63] These laws, among others, have broadened the scope of civil rights enforcement. They have expanded the jurisdiction of Federal civil rights enforcement responsibilities, without providing a corresponding increase in compliance resources. Consequently, in many cases, agencies assigned new responsibilities to existing, often limited, staff who performed Title VI activities, or agencies diverted staff and budgetary resources from Title VI enforcement to address new civil rights responsibilities.

Moreover, many civil rights enforcement officials, representing numerous Federal agencies, have indicated that the resources and the resolve to enforce *all* civil rights laws have declined in recent years.[64] Program funding is a primary measure of commitment to an activity. However, funding for civil rights enforcement has been reduced consistently relative to staff salaries.[65] Reductions in civil rights enforcement funds, along with inefficient allocation of existing resources, lack of proper training and knowledge in Title VI enforcement, and lack of strong leadership and commitment to enforce Title VI, undoubtedly have weakened agencies' abilities to fulfill their enforcement mandates.

## Scope and Methodology

Given the historical inadequacy of Title VI enforcement and the challenges posed by recent civil rights developments, the Commission chose to reexamine the effectiveness of the Federal Title VI enforcement effort. To accomplish this objective, the report evaluates DOJ's responsibilities, pursuant to Executive Order 12,250, for the oversight and coordination of Title VI implementation and enforcement.[66] This discussion focuses primarily on DOJ's obligation to establish policies and guidelines for Title VI implementation, compliance, and enforcement; monitor the quality and effectiveness of the Federal agencies' Title VI activities; provide enforcement support to the Federal agencies; conduct training, technical assistance, and outreach and education programs; and serve as a Title VI resource for the Federal agencies, community organizations, and the general public.

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[61] 20 U.S.C. §§ 1681–1688 (1988).

[62] 29 U.S.C. § 794 (1988 & Supp. V 1993).

[63] 42 U.S.C. §§ 12,101–12,213 (Supp. V 1993).

[64] *See, e.g.*, Danetta Fofanah, Chief, Division of Technical Assistance and Compliance Monitoring, Office of Program Compliance and Enforcement, Directorate of Civil Rights, U.S. Department of Labor, interview in Washington, D.C., July 18, 1994 (emphasis added).

[65] *See* chaps. 5–15 on the Federal agencies.

[66] These agencies are: the Department of Education; the Department of Health and Human Services; the Department of Agriculture (including, the Food and Nutrition Service, the Farmers Home Administration, Soil Conservation Service); the Department of Housing and Urban Development; the Department of Labor; the Department of the Interior; the Department of Transportation (including, the Federal Aviation Administration, the Federal Highway Administration, the Federal Railroad Administration, the Federal Transit Administration, the National Highway Traffic Safety Administration, the U.S. Coast Guard, the Research and Special Programs Administration); the Environmental Protection Agency; the Small Business Administration; and the Office of Justice Programs at the Department of Justice.

This report also examines the quality of the Federal agencies' implementation and enforcement of Title VI. The report determines whether the Federal agencies effectively utilize the equal opportunity compliance and enforcement mechanisms designed to eliminate discrimination in federally assisted programs. These activities include proactive measures such as preaward reviews, compliance reviews, training, technical assistance, and public outreach, as well as responsive measures such as complaint investigations and sanctions. The report analyzes the quality of the Federal agencies' monitoring, oversight, and evaluation of State agencies' Title VI enforcement programs. In addition, the report analyzes the quality and use of agency recordkeeping and data collection on its Title VI implementation, compliance, and enforcement efforts.

This report identifies and examines six important factors that directly affect the quality of Federal Title VI enforcement:

1) the adequacy of DOJ's oversight and coordination of Federal agencies' Title VI responsibilities;
2) the number of resources and staff that DOJ and the Federal agencies devote to Title VI enforcement;
3) the emphasis that DOJ and the Federal agencies place on Title VI enforcement;
4) the quality of the Federal agencies' monitoring, oversight, and evaluation of Title VI enforcement responsibilities delegated to State agencies;
5) the effects of recent civil rights statutes, such as the Americans with Disabilities Act, and the Civil Rights Restoration Act, on Title VI enforcement resources, and the effect of reassigning Title VI civil rights compliance resources to internal equal employment opportunity enforcement programs; and
6) the extent of executive leadership, management, and commitment to Title VI civil rights enforcement, on the part of DOJ and of the various executive agencies and departments.

This report does not address Title VI enforcement from the perspective of Federal program beneficiaries or State and local recipient governments. In this report, the Commission did not attempt to measure the social and economic effect on minority group members of the Federal Title VI civil rights enforcement effort or take into account changes in Federal, State, and local civil rights measures since 1975 that may have impacted, positively or negatively, on present conditions confronting minority groups in our society. When Commission reports recommend changes in existing laws, whether Title VI or other civil rights statutes, or new legislation, these and similar considerations are an essential part of the analysis. This report is narrowly limited to evaluating the Federal Title VI enforcement effort and is intended to assist DOJ and the Federal agencies in clarifying their present responsibilities under Title VI.

The report evaluates the Title VI activities of 10 Federal agencies from 1975 to 1994, and describes the requirements that apply equally to all agencies. The Commission based the report on several key sources. First, the Commission created a survey that addresses all aspects of Title VI implementation, compliance, and enforcement. The Commission forwarded the Title VI survey to all 27 Executive Branch departments and agencies requesting the following information:

1) an overview of their Title VI implementation and enforcement program (including information regarding their respective mission, program coverage, organization, staff, and budgetary resources);
2) self-appraisal or self-assessment of the agencies' regulations, directives, policies, guidelines, and implementation orders governing their Title VI enforcement efforts;
3) the agencies' perception of the services provided by DOJ;
4) a description of the agencies' Title VI civil rights functions (complaint processing, preaward and postaward reviews, routine monitoring, technical assistance, State and local cooperative efforts, and legal and administrative enforcement);

5) a list of their short-term and long-term goals and objectives for civil rights implementation, compliance, and enforcement; and
6) workload and performance data.[67]

In obtaining information on budgetary and staff resources, the Commission requested figures for fiscal years 1976, 1981, 1984, 1988, 1992, and 1993. DOJ, eight Federal agencies, and eight subagencies did not provide figures for fiscal year 1976.[68] The Commission relied on figures from its prior reports and information from various DOJ documents to analyze the Federal agencies' budget and staffing resources during the 1970s. Also, the report includes figures for 1994 as available to the Commission upon the report's completion.

The Commission also designed a Title VI survey exclusively for DOJ's Title VI coordination and oversight responsibilities under Executive Order 12,250.[69] In addition, the Commission conducted interviews with Federal civil rights officials and staff at DOJ and selected agencies. The report also relies on Title VI policy, implementation, compliance, and enforcement documents, such as agency Civil Rights Implementation Plans, provided by the Federal agencies.[70] Finally, the Commission reviewed literature analyzing Federal civil rights activities.

This review and analysis has provided the Commission with a unique view of Federal Title VI implementation, compliance, and enforcement efforts. The report is structured to serve several goals. First, the report provides an historical and legal background of Title VI that identifies the scope and purpose of the act and the roles of the President, DOJ, and the Federal agencies in enforcing Title VI. Second, the report identifies the responsibilities of DOJ, assesses the effectiveness of its Title VI activities, and provides findings and recommendations to improve DOJ's oversight and coordination of Title VI. Third, the report describes the required elements of an effective Federal Title VI implementation, compliance, and enforcement program. The report also details the individual Title VI implementation, compliance, and enforcement activities of 10 Federal agencies, analyzes the quality of their efforts, and provides findings and recommendations for each agency's Title VI program. Based on the review and analysis of each individual agency, the report also identifies general trends and problems affecting the Federal Title VI enforcement effort and presents findings and recommendations that apply to all of the Federal agencies. This examination of the Federal Government's Title VI activities is designed to strengthen the implementation and enforcement of the law, and support the Federal Government in its efforts to prevent discrimination in the access to, participation in, and benefits of Federal financial assistance.

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[67] U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsibilities for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993. The agencies' survey responses are cited within the discussion of each individual agency's Title VI activities.

[68] *See* U.S. Department of Justice, Civil Rights Division, Coordination and Review Section, Response to U.S. Commission on Civil Rights Title VI Questions, Nov. 9, 1993, Q. 3, p. 1; DOJ Survey, Q. 33, pp. 13–14; OCR 1994 Budget and Staffing Information, submitted to the U.S. Commission on Civil Rights by Jeanette Lim, Director, Policy, Enforcement, and Program Service, Office for Civil Rights, U.S. Department of Education; DOEd Survey, Qs. 33–36, pp. 21–24; HHS Survey, Qs. 33–36, pp. 26–31; USDA/OCRE Survey, Qs. 33–36, pp. 23–26; USDA/FNS Survey, Qs. 33–36, pp. 23–36; USDA/SCS Survey, Qs. 33–36, pp. 23–26; Carlton L. Lewis for Cheryl Prejean-Greaux, Acting Director, Equal Opportunity Staff, Farmers Home Administration, U.S. Department of Agriculture, memorandum to the U.S. Commission on Civil Rights, June 29, 1994, attachment no. 8; USDA/FmHA Survey, Qs. 33–36, pp. 23–26; HUD Survey, Qs. 33–36, pp. 19–22; DOL Survey, Q. 33–36, pp. 23–26; EPA Survey, Qs. 33–36, pp. 25–30; OJP Survey, Qs. 16–17, p. 17; DOT/OS Survey, Qs. 33–36, pp. 23–26; DOT/FAA Survey, Qs. 33–36, pp. 25–32; DOT/FRA Survey, Q. 26, p. 21, Qs. 33–34, pp. 25–28; DOT/FTA Survey, Q. 26, p. 24, Qs. 34–36, pp. 31–34; DOT/RSPA Survey, Qs. 33–36, pp. 27–32; and DOT/USCG Survey, Qs. 33–36, pp. 25–31.

[69] U.S. Commission on Civil Rights, *Survey of the Department of Justice Oversight and Coordination Responsibility for Consistent and Effective Implementation of Title VI of the Civil Rights Act of 1964*, response completed by the U.S. Department of Justice, Jan. 24, 1994.

[70] The Commission relied on information and data contained in the Civil Rights Implementation Plans, because these plans are intended to fulfill each agency's reporting and planning obligations under DOJ's coordination regulations. *See* 28 C.F.R. § 42.415 (1994). When the Commission's analysis of budget, resources, and workload data revealed either an absence of information or information inconsistent with the Title VI surveys, the Commission made every effort to obtain accurate figures from the agencies. Whenever possible, the Commission created tables to represent and compare the agencies' data. However, often it was difficult to compare the agencies' budget, resources, and workload data, because the agencies do not use a uniform system or format to record this data.

## Chapter 2

# Background

*No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.*[1]

*The policy underlying the enactment of Title VI is so fundamentally correct that there is little need for an additional statement on its behalf.*[2]

The principle of nondiscrimination in public programs did not originate with Title VI of the Civil Rights Act of 1964.[3] Presidents Truman, Eisenhower, Kennedy, and Johnson each endeavored to prevent discrimination in the use of public funds.[4] Executive orders prohibited racial discrimination in the armed forces,[5] employment by contractors in federally funded construction projects,[6] and federally assisted housing.[7] In addition, members of Congress repeatedly proposed legislative amendments to prohibit racial discrimination in various Federal assistance programs.[8] Several Federal agencies also advanced the eradication of discrimination in some of the programs they sponsored.[9] For example, they proscribed race-based discrimination in programs such as educational training institutes, mental health projects, and apprenticeship programs.[10]

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[1] 42 U.S.C. § 2000d (1988).

[2] H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, 24 (1964) (hereafter cited as House Report), *reprinted in* 110 U.S.C.C.A.N. 2510. *See also* 110 Cong. Rec. 7064 (1964) (statement of Sen. Ribicoff) ("Of all the provisions of this civil rights bill, none rests on so simple and so sound a principle as does this [T]itle VI. That principle is taxpayers' money, which is collected without discrimination, shall be spent without discrimination. . . . It is based on simple justice. It is based on ordinary decency.")

[3] *See* 110 Cong. Rec. 7064 (1964) (statement of Sen. Ribicoff).

[4] *See* 110 Cong. Rec. 8344 (1964) (statement of Sen. Proxmire); *id.* at 7103 (statement of Sen. Javits); *id.* at 7062 (statement of Sen. Pastore); *id.* at 6544 (statement of Sen. Humphrey). *See also Civil Rights: Hearings Before Subcommittee No. 5 of the Committee on the Judiciary House of Representatives*, 88th Cong., 1st Sess., Part II, 932 (1963) (hereafter cited as Subcommittee Hearings); Comment, *Title VI of Civil Rights Act of 1964—Implementation and Impact*, 36 Geo. Wash. L. Rev. 824, 826 (1968) (hereafter cited as *Title VI*); Raymond Celeda, *Nondiscrimination in Federally Assisted Programs: Legislative History and Analysis of Title VI of the Civil Rights Act of 1964*, Library of Congress, Legislative Referral Service, 5 (1975) (hereafter cited as Celeda).

[5] Exec. Order No. 9981, 3 C.F.R. 722 (1943–1948). *See* 110 Cong. Rec. 7103 (1964) (statement of Sen. Javitts).

[6] Exec. Order No. 10,479, 3 C.F.R. 968 (1949–1953). *See* 110 Cong. Rec. 7062 (1964) (statement of Sen. Pastore); *id.* at 6544 (statement of Sen. Humphrey).

[7] Exec. Order No. 11,063, 3 C.F.R. 652–56 (1959–1962). *See* 110 Cong. Rec. 7103 (1964) (statement of Sen. Javitts).

[8] *See, e.g.*, 110 Cong. Rec. 7062 (1964) (statement of Sen. Pastore); *id.* at 6561 (statement of Sen. Kuchel); *id.* at 2465 (statement of Rep. Powell).

[9] *See, e.g.*, 110 Cong. Rec. 7062 (1964) (statement of Sen. Pastore).

Despite these earlier efforts to further racial equality, discrimination remained widely subsidized by public funds at the time Title VI was introduced in Congress.[11] In 1964 many citizens still were denied the equal benefit of social programs because of their race. For example, although Federal agencies were granting Federal funds to assist in the construction of hospitals and other health care facilities, blacks were denied access to, and segregated within, those establishments; black doctors were denied staff privileges; and blacks in the medical field generally were denied employment opportunities.[12] The National Guard, which secured most of its operating expenses from Federal funds, still required segregation in its units.[13] Substantial grants of public funds also were made regularly for construction, maintenance, and operation of schools; however, black students were separated from white students in many States.[14] The same was true with respect to higher education opportunities and agricultural extension services.[15]

## Reasons for Enacting Title VI

Supporters of Title VI considered its enactment imperative for several specific reasons. First, several then-existing statutes expressly provided for Federal grants to racially segregated institutions under the "separate-but-equal" doctrine.[16] These laws were enacted before the Supreme Court's decision in *Brown v. Board of Education*[17] that "separate-but-equal" was inherently unequal.[18] However, that decision applied specifically to public education and did not directly invalidate the statutory provisions at issue. Consequently, although their validity after *Brown* was doubtful, supporters of Title VI considered legislative action necessary to "wipe them off the books."[19]

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[10] *See* Celeda, at 5. *See also Civil Rights Under Federal Programs*, U. S. Commission on Civil Rights Special Publication No. 1 (Jan. 1965), p. 5; Bureau of National Affairs Operational Manual, *Civil Rights Act of 1964* (1964), p. 91.

[11] *See Title VI*, at 838.

[12] *See* House Report, pt. 2, at 24, *reprinted in* 110 U.S.C.C.A.N. 2511–12; 110 Cong. Rec. 6834–35, 6838, 7054 (1964) (statement of Sen. Pastore) ("In the community of Greensboro, N.C., there are two excellent hospitals. They are numbered among the most modern in that area. This is due, in part, to [F]ederal financial assistance. Under the Hill-Burton Act, one of these hospitals received $1,300,000 in [F]ederal aid. That took care of 17 percent of its construction costs. The other hospital accepted nearly $2 million from the Federal Government. This satisfied half the cost of its construction. They are two very good hospitals. But there is one thing wrong with both of them: The doors of these hospitals would not open to a large segment of the Greensboro community.Their modern medical care was denied to those whose skin was colored—denied strictly and solely on the basis of the color of the patient's skin. The [F]ederal funds that helped to build these hospitals were raised, of course, by taxation—taxes paid by both white and negro citizens. But the Negro in need of care could not get it at these hospitals simply because he was a Negro. . . . That is why we need [T]itle VI . . . to prevent such discrimination where [F]ederal funds are involved. . . . Title VI intends to ensure once and for all that the financial resources of the Federal Government—the common wealth of Negro and white alike—will no longer subsidize racial discrimination."). *See also* 110 Cong. Rec. 6543 (1964) (statement of Sen. Humphrey); *id.* at 2481–82 (statement of Rep. Ryan).

[13] *See* 110 Cong. Rec. 6562 (1964) (statement of Sen. Kuchel).

[14] *See* 110 Cong. Rec. 7055–56 (1964) (statement of Sen. Pastore); *id.* at 6562 (Senator Kuchel); *id.* at 6543 (Senator Humphrey); *id.* at 2481 (statement of Rep. Ryan).

[15] *See* 110 Cong. Rec. 7056–57 (1964) (statement of Sen. Pastore); *id.* at 6543 (statement of Sen. Humphrey).

[16] *See* 110 Cong. Rec. 2467–68 (1964) (statement of Rep. Celler) ("[W]e have such 'separate-but-equal' provisions embedded in our statutes. They are contained in the Hill Burton Act . . ., 42 U.S.C. § 291a(f), and the second Morill Land Grant Act, 7 U.S.C. § 323, and by implication, Public Law 815 providing grants for school construction . . ., 20 U.S.C. § 636(a) (f)."); *id.* at 6950, 7064 (statement of Sen. Ribicoff). *See also* U. S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974; To Extend Federal Financial Assistance*, 8 vols. (November 1975), vol. 6, p. 3 (hereafter cited as *Federal Enforcement Effort*); *Title VI*, at 828–29.

[17] 347 U.S. 483 (1954).

[18] *Id.* at 495.

Second, although Federal agencies already possessed the power to prohibit racial discrimination in their assistance programs, some remained reluctant to do so.[20] Title VI would eliminate any doubts about this authority.[21] Supporters of Title VI stressed that the statute did not "confer a sweeping new authority, of undefined scope, to [F]ederal departments and agencies," but instead it would mandate the exercise of existing authority to eliminate discrimination by Federal fund recipients and would furnish the procedure to support this purpose.[22] Congressman Celler explained:

> The enactment of [T]itle VI is intended to provide . . . express statutory support for action being taken by the executive branch. . . . [W]hile the executive branch is believed in most cases to have adequate authority to preclude discrimination or segregation by recipients of Federal assistance, the enactment of [T]itle VI would clarify and confirm that authority. It would tend to confirm that the policy of nondiscrimination would be continued in future years as a permanent part of our national policy.[23]

Third, the issue of racial equality had arisen regularly during legislation of public programs in the past.[24] Nondiscrimination amendments, commonly known as "Powell Amendments,"[25] were offered repeatedly to bills extending financial assistance. Consequently, Congress was compelled to debate the issue when considering any spending measure.[26] Again, Congressman Celler explained:

> Enactment of [T]itle VI seeks to avoid legislative debate over the so-called Powell amendment. . . . [R]epeatedly in recent years amendments have been offered in Congress to bills providing for or extending Federal assistance to education, housing, and other matters, which would preclude assistance to segregated institutions. . . . Title VI enables Congress to consider the overall issue of racial discrimination separately from the issue of the desirability of a particular Federal assistance programs. Its enactment would avoid for the future the occasion for further legislative maneuvers like the so-called Powell amendment.[27]

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[19] 110 Cong. Rec. 6544 (1964) (statement of Sen. Humphrey). *See also, id.* at 9091 (statement of Sen. Case); *id.* at 6959 (statement of Sen. Ribicoff); *id.* at 2467 (statement of Rep. Celler); *Federal Enforcement Effort*, pp. 3–4.

[20] *See* 110 Cong. Rec. 7102, 7103 (1964) (statement of Sen. Javitts); *id.* at 7067 (statement of Sen. Ribicoff) (discussing "ample precedent for congressional authorization for agencies to take effective action, including cutoff of funds, to secure compliance with statutory standards."); *id.* at 6544 (statement of Sen. Humphrey); *id.* at 6047 (statement of Sen. Pastore); *id.* at 2484 (statement of Rep. McCulloch); *id.* at 6561 (statement of Sen. Kuchel).

[21] *See* 110 Cong. Rec. 7103 (1964) (statement of Sen. Javitts); *id.* at 7061, 7062 (statement of Sen. Pastore); *id.* at 6561 (statement of Sen. Kuchel); *id.* at 6544 (statement of Sen. Humphrey); *id.* at 1527 (statement of Rep. Celler). *See also Federal Enforcement Effort*, p. 5; *Title VI*, at 829.

[22] House Report, pt. 1, at 25 (Senator Humphrey noted that "existing statutory authority [was], however, not surrounded by the procedural safeguards which Title VI provides.").

[23] 110 Cong. Rec. 2468 (1964). *See also id.* at 9091 (statement of Sen. Case); *id.* at 7065 (Senator Ribicoff); *id.* at 1521 (statement of Rep. Celler).

[24] *Federal Enforcement Effort*, p. 6.

[25] Congressman Adam Clayton Powell so frequently proposed a nondiscrimination amendment to single items of legislation that the amendment became known as "the Powell Amendment." *Federal Enforcement Effort*, p. 6, n. 19 (citing 110 Cong. Rec. 6544 (1964) (statement of Sen. Humphrey)).

[26] *See* 110 Cong. Rec. 13,331 (1964) (statement of Sen. Gore); *id.* at 6544 (statement of Sen. Humphrey). *See also Federal Enforcement Effort*, p. 6; *Title VI*, at 829.

[27] 110 Cong. Rec. 2468 (1964). *See also id.* at 9091 (statement of Sen. Case); *id.* at 7065 (statement of Sen. Ribicoff); *id.* at 7061, 7062 (statement of Sen. Pastore); *id.* at 6544 (statement of Sen. Humphrey) (promulgation of Title VI would "settle the issue of discrimination once and for all, in a uniform, across-the-board manner, and thereby . . . avoid having to debate the issue in a piecemeal fashion every time any one of these Federal assistance programs [was] before the Congress.").

A fourth reason for enacting Title VI was that its supporters considered it an efficient alternative to litigation.[28] It was uncertain whether the courts would declare as unconstitutional Government funding of private discrimination. Prior court decisions had demonstrated that litigation involving private discrimination would proceed slowly and would require particularized findings of fact.[29] The adoption of Title VI would provide an alternative to such an arduous route.[30]

A fifth reason was that operation of a Federal assistance program in a discriminatory fashion defeats the program's congressionally imposed objective.[31] Specifically, when Congress legislates assistance programs, it defines the class of persons eligible to participate in, or receive the benefits of, such programs. Consequently, if a program excludes individuals from eligibility because of their race, color, or national origin, the exclusion necessarily undermines the program's purpose.[32]

Finally, the most significant reason behind enacting Title VI was that, at that time, racial discrimination was rampant in the execution of federally funded programs.[33] For example, in 1962, the States of Alabama, Georgia, Mississippi, South Carolina, and Virginia received a total of more than $35 million for public school construction and operation.[34] However, for that school year, almost total segregation of blacks and whites existed in the schools in those States.[35] Similarly, between 1946 and 1963, the Federal Government had granted $36.8 million to 89 racially segregated medical facilities.[36] Title VI represented the moral sense of the Nation that there should be racial equality in Federal assistance programs.[37]

## Constitutional Basis for Enacting Title VI

The primary powers of Congress are enumerated in Article I, Section 8, of the United States Constitution.[38] That section grants Congress the power, among other things, to levy taxes, make expenditures for national defense and the general welfare of the United States, and regulate interstate commerce. The section also empowers Congress to "make all Laws which shall be necessary and proper for carrying into Execution" both the specific legislative powers granted to Congress by the Article itself and "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Office thereof."[39]

Title VI's sponsors deemed its enactment an extension of Congress' power under clause 1 of Article I, Section 8,[40] commonly known as the

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[28] *Federal Enforcement Effort*, pp. 4–5.

[29] Ibid., p. 5.

[30] Ibid.

[31] Ibid., p. 8.

[32] Ibid.

[33] Ibid., p. 7. *See also* 110 Cong. Rec. 6543–47 (1964) (statement of Sen. Humphrey).

[34] *Federal Enforcement Effort*, p. 7.

[35] Ibid., n. 23 (citing 110 Cong. Rec. 6543 (1964) (statement of Sen. Humphrey)).

[36] Ibid.

[37] Ibid., p. 6.

[38] U.S. Const. art. I, § 8.

[39] *Id.* § 8, cl. 18.

[40] *Id.* § 8, cl. 1.

"spending clause."[41] That section provides that "Congress shall have Power . . . to pay debts and provide for the common Defence and general Welfare of the United States. . . ."[42] In *Oklahoma v. United States Civil Service Commission*,[43] the Supreme Court recognized that while the Federal Government had no power to regulate certain State and local activities, it did have the "power to fix the terms upon which its money allotments to States [were] dispersed."[44] Relying upon the Supreme Court's interpretation of the spending clause in *Oklahoma*, Title VI's sponsors considered its enactment an exercise of Congress' "unquestionable authority to fix the terms on which Federal funds are disbursed."[45] In *Guardians Association v. Civil Service Commission*,[46] the Supreme Court confirmed this extension of Congress' spending power. The Court stated that the legislative history of Title VI "clearly show[ed] that Congress intended Title VI to be a typical 'contractual' spending power provision."[47]

Congress also relied upon the 5th[48] and 14th[49] amendments to the Constitution in enacting Title VI. Supporters of Title VI regarded the equal protection principle as the foundation for congressional action proscribing racial segregation in State and local programs and activities dependent upon Federal funds.[50] Moreover, according to its sponsors, enactment of Title VI was *not* pursuant to clause 3 of Article I, Section 8, of the

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[41] *See, e.g.*, 110 Cong. Rec. 6546 (1964) (statement of Sen. Humphrey). *See also* Bernard Schwartz, *Statutory History of the United States: Civil Rights*, Part II (1970), p. 1019 (The power to tax includes the power to spend and, equally as significant, the power to establish the conditions upon which Federal funds will be dispensed. Congress was using its power of the purse to enforce the basic guarantee of racial equality in a manner that could have the greatest impact in States where patterns of discrimination had existed.) (hereafter cited as Schwartz).

[42] U.S. CONST. art. I, § 8, cl. 1.

[43] 330 U.S. 127 (1947).

[44] *Id.* at 143.

[45] 110 Cong. Rec. 6546 (1964) (statement of Sen. Humphrey). *See also id.* at 7063 (statement of Sen. Pastore); *id.* at 6562 (statement of Rep. Kuchel); *id.* at 2468 (statement of Rep. Rodino); *id.* at 1613 (statement of Rep. Meader); *id.* at 1527, 2467 (statement of Rep. Celler) (citing United States v. San Francisco, 310 U.S. 16 (1942)).

[46] 463 U.S. 582 (1983).

[47] *Id.* at 599. *See also* United States v. Marion County Sch. Dist., 625 F.2d 607, 609, *reh'g denied*, 629 F.2d 1350 (1980), *cert. denied*, 451 U.S. 910 (1981). ("[T]he United States has authority to fix the terms and conditions upon which its money allotments to [S]tate and other governmental entities should be disbursed. . . . [T]he United States may attach conditions to the grant of [F]ederal assistance, the recipient of the grant is obligated to perform the conditions, and the United States has an inherent right to sue for enforcement of the recipients obligations in court.") (citations omitted).

[48] U.S. CONST. amend. V. The fifth amendment provides, in pertinent part, that no person within the United States shall be "deprived of life, liberty, or property, without due process of law."

[49] U.S. CONST. amend. XIV. The 14th amendment provides, in pertinent part, that a State shall not "deny to any person within its jurisdiction the equal protection of the law."

[50] *See, e.g.*, 110 Cong. Rec. 1527 (statement of Rep. Celler) ("[A] strong argument can be made that the Constitution requires that programs and activities receiving significant financial assistance from the United States refrain from racial segregation or discrimination. The Fifth Amendment prohibits racial discrimination or segregation by the United States, at least in the absence of compelling justification. *Bolling v. Sharpe*, 347 U.S. 497 (1954). . . . The prohibitions of the 14th amendment extend to governmental action 'designed to perpetuate discrimination.' *Railway Mail Association v. Corsi*, 326 U.S. 88, 94 (1945). They may extend to actions of private persons and organizations if the Government participates in those actions. *Cooper v. Aaron*, 350 U.S. 1, 4 (1958). If the Government, through such arrangement, can be said to have 'elected to place power, prestige, and property behind the admitted discrimination, 'the courts may deem it a "joint participant" and hold the segregation or discrimination unlawful.' *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 724, 725 (1961). In such circumstances, the Government may be under a duty to take affirmative action to preclude racial segregation or discrimination by private entities in whose activities it is a participant. *Id.*")

Constitution, commonly known as the "commerce clause."[51] Supporters of Title VI did not intend for it to serve as a regulatory measure over State and local activities. Instead, its backers contended that Title VI merely created a contractual responsibility,[52] and that "[n]o recipient [was] required to accept Federal aid. If he [did] so voluntarily, he must take it on the conditions on which it [was] offered."[53] Proponents considered the principle to be simple: "Stop the discrimination, get the money; continue the discrimination, do not get the money."[54]

## Overview of the Legislative History of Title VI

On June 19, 1963, President Kennedy submitted to Congress the proposed Civil Rights Act of 1963.[55] In the message that accompanied that proposal,[56] the President introduced the principle upon which Title VI ultimately would be founded:

> Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination. Direct discrimination by Federal, State, or local governments is prohibited by the Constitution. But indirect discrimination, through the use of Federal funds, is just as invidious; and it should not be necessary to resort to the courts to prevent each individual violation.[57]

Pursuant to that message, the Chairman of the House Judiciary Committee immediately introduced the Administration omnibus civil rights bill.[58] The original version of Title VI of that bill consisted only of a declaration of policy against discrimination in the use of Federal funds; it provided that termination of Federal funds by agency administrators was discretionary:[59]

> Notwithstanding any provision to the contrary in any law of the United States providing or authorizing direct or indirect financial assistance for or in connection with any program or activity by way of grant, contract, loan, insurance, guaranty, or otherwise, no such law shall be

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[51] U.S. CONST. art. I, § 8, cl. 3. The commerce clause provides Congress with the authority to "regulate Commerce . . . among the several States." The clause became a significant source of Conressional regulatory power over State and local activities, because its provision to regulate commerce "among" States was interpreted by the Supreme Court to include regulating activity within a State, when such activity might affect interstate commerce. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp. 301 U.S. 1 (1937); Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942); United States v. Rock Royal Co-operative, Inc., 307 U.S. 533 (1939); Maryland v. Wirtz, 392 U.S. 183 (1968). In particular, Congress has employed the commerce clause to prevent discriminatory activities of private organizations that might impact upon interstate commerce. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).

[52] *See, e.g.*, 110 Cong. Rec. 7063 (1964) (statement of Sen. Pastore); *id.* at 6562 (statement of Sen. Kuchel); *id.* at 6546 (statement of Sen. Humphrey); *id.* at 1542 (statement of Rep. Lindsay); *id.* at 1527 (statement of Rep. Celler) (citing Massachusetts v. Mellon, 262 U.S. 447, 480 (1923) ("[T]he powers of the States are not invaded since the statute imposes no obligation but simply extends an option which the State is free to accept or reject.")).

[53] 110 Cong. Rec. 6546 (1964) (statement of Sen. Humphrey).

[54] *See, e.g.*, 110 Cong. Rec. 1542 (1964) (statement of Rep. Lindsay).

[55] *See* Celeda, at 6.

[56] H.R. DOC. NO. 124, 88th Cong., 1st Sess. (1963), *reprinted in* 110 U.S.C.C.A.N. 2392 (hereafter cited as House Document). *See* Celeda, at 6.

[57] House Document, at 12. *See* Celeda, at 7.

[58] *See* Subcommittee Hearings, Part II, at 907–08 (opening remarks of Rep. Celler); House Report, pt. 1, at 44 (additional views of Hon. George Meader), *reprinted in* 110 U.S.C.C.A.N. 2413. *See also* Celeda, at 6 ("Save for a second sentence prohibiting discrimination in employment by any contractor under federally assisted programs, the original version of Title VI contained little beyond [the President's] description of it").

[59] *See Title VI*, at 832; Celeda, at 6.

> interpreted as requiring that such financial assistance shall be furnished in circumstances under which individuals participating in or benefitting from the program or activity are discriminated against on the ground of race, color, religion, or national origin or are denied participation or benefits therein on the ground of race, color, religion, or national origin. All contracts made in connection with any such program or activity shall contain such conditions as the President may prescribe for the purpose of assuring that there shall be no discrimination in employment by any contractor or subcontractor on the ground of race, color, religion, or national origin.[60]

A House Judiciary Committee Subcommittee conducted hearings on the administration bill, along with 172 other bills introduced by members of Congress.[61] The version of Title VI ultimately proposed by the subcommittee modified the language of the administration's statement of policy and expanded it to include three additional sections.[62] The revised statement of policy provided:

> Notwithstanding any inconsistent provision of any other law, no person in the United States shall, on ground of race, color, religion or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[63]

Like the original bill, the new version covered all types of Federal financial assistance, including programs by way of grant, contract, loan, insurance, and guaranty.[64]

The first additional section *mandated* agencies to effectuate the nondiscrimination policy set forth in the first section of the title, thereby eliminating the discretion afforded agency officials by the administration proposal.[65] In addition, that section authorized agencies to promulgate any "rule, regulation, or order of general applicability . . . consistent with the achievement of the objectives" of the underlying assistance program. Agencies could secure compliance by (1) civil suit; (2) termination of funds (upon an express finding of noncompliance); or (3) other means authorized by law. No action could be taken, however, until the enforcing agency notified the party in noncompliance and determined that the party would not comply voluntarily.[66]

The second additional section expressly provided that any rule, regulation, or order adopted pursuant to the previous section was enforceable in district court by a civil action or other proper proceeding brought by or on behalf of the Federal agency.[67] The final additional section authorized judicial review of any agency action brought in accordance with Title VI.[68]

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[60] H.R. 7152, 88th Cong., 1st sess. (1963). *See* Celeda, at 69, n. 15.

[61] *See* House Report, pt. 1, at 16, *reprinted in* 110 U.S.C.C.A.N. 2392. *See also id.* at 44 (additional views of Hon. George Meader, *reprinted in* 110 U.S.C.C.A.N. 2413 (The hearings consisted of 22 days of testimony, by 101 witnesses, and were reproduced in three volumes of 2,649 printed pages.)

[62] *See Title VI*, at 833; Celeda, at 10.

[63] H.R. 7152, 88th Cong., 1st sess., Sect. 701 (1963). *See* Celeda, at 11.

[64] *See* Celeda, at 11.

[65] H.R. 7152, 88th Cong., 1st Sess., Sect. 702 (1963) (emphasis added). "Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, contract, loan, insurance, guaranty, or otherwise, *shall take action* to effectuate the provisions of Section 701 with respect to such program or activity. Such action may be taken by or pursuant to rule, regulation, or order of general applicability and shall be consistent with the achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. Compliance with any requirement adopted pursuant to this section may be effected (1) by suit under Section 703 of this title, (2) by the termination of or refusal to grant or to continue assistance upon an express finding that there has been a failure to comply with such requirement, or (3) by any other means authorized by law: Provided, however, that no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means." *Id.*

[66] *Id.*

The subcommittee sent its version to the full Judiciary Committee for consideration. The full committee ultimately adopted three changes to the subcommittee version:[69] (1) it eliminated "religion" as one of the covered grounds; (2) it limited Federal assistance "by way of grant, contract, loan, insurance, guaranty or otherwise" to Federal assistance "by way of grant, contract, or loan"; and (3) it deleted the express authority to bring civil suits in district court.[70] The committee version, like the subcommittee version, required agencies to "take action" to implement Title VI.[71]

The bill was reported out of committee and forwarded to the House floor for consideration. There, 14 amendments to Title VI were proposed, 4 of which were adopted.[72] Specifically, the House amended the committee's proposal to (1) exclude explicitly contracts of insurance or guaranty;[73] (2) require Presidential approval of any rules, regulations, or orders adopted by agencies pursuant to Title VI;[74] (3) provide for a hearing to determine recipient noncompliance;[75] and (4) mandate that agencies notify the proper committee of Congress 30 days in advance of exercising termination authority.[76]

In the Senate, the bill went directly to the Senate floor.[77] The result of the Senate debate was a compromise package, known as the Mansfield-Dirksen substitute, which ultimately became the act.[78] That version made additions to, but did not otherwise alter substantially the nature of, the House version of Title VI.[79] Additional provisions required that: (1) termination of financial assistance be limited to the particular recipient found in noncompliance, and further limited to the particular program, or part thereof, in which noncompliance was found;[80] (2) Title VI's mandate not be construed to authorize action with respect to any employment practice where the objective of the assistance program at issue was not to provide employment;[81] and that (3) Title VI's mandate not affect any *existing* authority with respect to any assistance program or activity."[82] The Senate version also made the issuance of rules and regulations by Title VI agencies mandatory.[83]

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[67] H.R. 7152, 88th Cong., 1st Sess., Sect. 703 (1963): "Any requirement adopted pursuant to Section 702, whether by rule regulation, order, agreement or otherwise, shall be enforceable in the district courts of the United States by means of a civil action or other proper proceeding, including an application for a permanent or temporary injunction, restraining order, or other order, brought by or on behalf of the United States or any agency or officer thereof expressly authorized to bring suits by Act of Congress."

[68] H.R. 7152, 88th Cong., 1st Sess., Sect. 704 (1963). *See* Celeda, at 12. Section 704 of the subcommittee bill was retained as section 603 of the ultimate version of Title VI. 42 U.S.C. § 2000d-3 (1988). *See Title VI*, at 842.

[69] *See* House Report, pt. 1, at 17, *reprinted in* 110 U.S.C.C.A.N. 2393; *id*. at 45–46 (additional views of Hon. George Meader), *reprinted in* 110 U.S.C.C.A.N. 2414–15. *See also* Celeda, at 12 (the subcommittee version was much stronger than the administration proposal and supporters feared it would not pass; therefore, the Judiciary Committee adopted a substitute amendment.).

[70] *See* Celeda, at 12–13. The last two revisions did not effectively alter the bill. First, although the committee deleted the subcommittee's provision authorizing civil actions in district courts, it retained the provision that enforcement could be sought "by any other means authorized by law." Therefore, opponents argued, a civil suit in district court was still authorized. Second, although the words "guaranty" and "insurance" were eliminated by the committee version, "contract" was preserved. Therefore, opponents contended, any *contract* of insurance or guaranty was still covered. Opponents viewed these modifications as a trick. House Report, pt. 1, at 74 (Minority Report), *reprinted in* 110 U.S.C.C.A.N. 2444. *See also Title VI*, at 829; Celeda, at 13. *See also* discussion in this chapter, pp. 31–34.

[71] *See* Celeda, at 13.

[72] *See id*. at 14.

[73] *See* 110 Cong. Rec. 2416, 2500 (1964) (statement of Rep. Celler). *See also* Celeda, at 16–17; discussion in this chapter, pp. 31–34.

[74] *See* 110 Cong. Rec. 2416, 2499 (1964) (statement of Rep. Lindsay). *See also* Celeda, at 15–16.

[75] *See* 110 Cong. Rec. 2422–23, 2505 (1964) (statement of Rep. Lindsay). *See also* Celeda, at 17.

[76] *See* 110 Cong. Rec. 2414–16, 2498 (1964) (statement of Rep. Willis). *See also* Celeda, at 14–15. On February 10, 1964, the House passed and forwarded to the Senate this version of Title VI of the Civil Rights Act of 1964. *See* Celeda, at 17.

[77] *See* Schwartz, p. 1089.

## Present Title VI Enforcement Structure

Title VI provides that "[n]o person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[84] Its objective is to prohibit discrimination by recipients of Federal funds against the intended beneficiaries of those funds. It mandates that Federal agencies[85] providing financial assistance administer and enforce the policy through the issuance of rules, regulations, or orders establishing the standards for recipient compliance with Title VI.[86] These rules, regulations, and orders must be "consistent with the achievement of the objectives" of the program or activity for which the financial assistance is being extended.[87] They also must be approved by the President.

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[78] *See* 110 Cong. Rec. 11,926–35, 12,587, 14,013 (1964). *See also* Schwartz, pp. 1089–91 (The debate in the Senate over the act lasted 83 days (the longest in history), took up some 7,000 pages in the *Congressional Record*, and produced the longest filibuster in Senate history, as well as the first successful invocation of cloture in many years.).

[79] *See* 110 Cong. Rec. 15,896 (1964) (statement of Rep. Celler). *See also* Schwartz, p. 1091.

[80] *See* 110 Cong. Rec. 15,896 (1964) (statement of Rep. Celler). *See also* Celeda, at 18. The Civil Rights Restoration Act of 1987 amended "program or activity" in Title VI to include all of the operations of an organization if any part therein receives Federal funds. 42 U.S.C. § 2000d-4a (1988). *See* discussion in this chapter, pp. 36–40.

[81] *See* 110 Cong. Rec. 15,896 (1964) (statement of Rep. Celler). *See also* Celeda, at 18–19.

[82] *See* Celeda, at 20–21; Title VI, at 838–39. *See also* discussion in this chapter, pp. 32–35.

[83] *See Title VI*, at 835. On July 2, 1964, the House concurred in the Senate amendment, and the bill was approved by President Johnson. *See* Celeda, at 18.

[84] 42 U.S.C. § 2000d (1988).

[85] "Agency," as used herein, shall refer to the Federal department or agency extending financial assistance; "recipient" shall mean the "secondary recipient," or State or local agency in charge of the program or activity at issue; and, "beneficiary" shall mean the person(s) whom the program or activity is intended to benefit.

[86] 42 U.S.C. §2000d-1 (1988): "Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objective of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, that no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written

The statute further provides that an agency may enforce compliance with such rule, regulation, or order either: (1) by terminating or refusing to grant or to continue financial assistance, or (2) by "any other means authorized by law." Action under the first enforcement provision may not be taken until and unless there has been an "express finding on the record, after opportunity for hearing," of noncompliance.[88] That action must be limited in its effect to the particular recipient, or part thereof, and the particular program in which a violation has been found.[89]

In addition to these limitations, no action of any kind may be taken unless and until the agency has advised the recipient of its failure to comply and has determined that compliance cannot be achieved voluntarily.[90] If the agency selects termination or discontinuance of financial assistance as the means of enforcement, it must file a written report justifying its action with the congressional committee having jurisdiction over the particular assistance program. No action may be finalized until 30 days thereafter.[91]

The statute also provides that any and all agency action taken to effect compliance under Title VI is subject to judicial review. The type of review granted is that "as may otherwise be provided by law for similar action taken by such department or agency on other grounds."[92] Where agency action involves the denial of financial assistance, any aggrieved person may request judicial review.[93]

## Scope of Title VI Jurisdiction

### Specific Exclusions of Title VI

Title VI's prohibition against discrimination does not extend to all forms of Federal financial assistance. Generally, it does not cover financial assistance extended by the Federal Government directly to beneficiaries, nor does it cover assistance by way of contracts of insurance or guaranty. In addition, its application to employment

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report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report."

[87] *Id.*

[88] *Id.*

[89] The Civil Rights Restoration Act of 1987 amended "the definition of program or activity" in Title VI as it applies to the scope and coverage of Title VI and the reach of fund termination actions. 42 U.S.C. § 2000d-4a (1988). *See* discussion in this chapter, pp. 36–40.

[90] 42 U.S.C. § 2000d-1 (1988).

[91] *Id.*

[92] 42 U.S.C §2000d-2 (1988): "Any department or agency action taken pursuant to section 2000d-1 of this title shall be subject to judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 2000d-1 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that chapter."
The purpose of this last provision was to preclude the argument that although Title VI provides for review in accordance with the Administrative Procedure Act, section 10 of that act provides for an exception for action "committed to agency discretion," which might otherwise also be carried over into Title VI. *See* Celeda, at 56 (citing House Report, pt. 1, at 26).

[93] *Id.*

discrimination is limited; and it does not apply to discrimination on the basis of gender, age, disability, or religion.[94]

### Direct Assistance Programs

The nondiscrimination policy and enforcement provisions of Title VI do not apply to Federal assistance extended directly to ultimate beneficiaries of such assistance. Instead, Title VI applies to funds granted to State and local governments and private organizations which, in turn, operate programs and activities for those beneficiaries. It is the conduct of those governmental and private organizations, as the recipients of such funds, to which Congress intended Title VI to apply. Hence, Title VI vested Federal funding agencies with the responsibility of ensuring that funding recipients implement the nondiscrimination provisions of Title VI in the programs and activities they administer and operate.

The Federal Government does provide some financial assistance directly to beneficiaries. The majority of such programs include those that provide income security, such as social security retirement payments.[95] Other forms of direct assistance include federally funded medical care, farm subsidies, and retirement benefits.[96] Although Title VI does not cover direct assistance programs, illegal discrimination in their administration may be challenged directly under the fifth amendment to the United States Constitution.[97]

### Gender, Age, and Disability as Protected Classes

Title VI's prohibition does not apply to discrimination on the basis of gender, age, or disability. However, civil rights statutes enacted subsequent to Title VI protect beneficiaries of federally funded programs from such discrimination. Title IX of the Higher Education Amendments Act of 1972[98] extended the principle of nondiscrimination in the use of Federal funds to gender-based discriminatory practices. Section 504 of the Rehabilitation Act of 1973[99] prohibited discrimination against persons with disabilities in the operation of federally funded programs and activities. The Age Discrimination Act of 1975[100] applied the principle of nondiscrimination in the use of Federal funds to discriminatory practices based upon age.

Each of these statutes effectively extends Title VI to instances of discrimination on bases other than race and ethnicity. For example, Title IX proscribes gender discrimination in educational programs and activities receiving Federal financial assistance in language that is virtually identical to that in Title VI. It includes the same requirements that affected agencies promulgate regulations implementing the nondiscrimination provision, obtain Presidential approval of such regulations, and notify Congress of intended sanctions.[101]

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[94] *See Federal Enforcement Effort*, p. 9.

[95] Ibid.

[96] Ibid.

[97] See ibid, pp. 9–10. *See also* Bolling v. Sharpe, 347 U.S. 497 (1954) (holding that the due process clause of the Fifth Amendment imposes an equal protection obligation on the Federal Government).

[98] 20 U.S.C. §§ 1681–1688 (1988).

[99] 29 U.S.C. § 794 (1988 & Supp. V 1993).

[100] 42 U.S.C. §§ 6102–6107 (1988).

[101] *See id.*

### Religion

Title VI's prohibition does not apply to discrimination based on religion. Although both the administration and the subcommittee bills specifically included religion as protected by Title VI, Congress subsequently deleted any reference to religion. It indicated that there was no demonstration of religious discrimination in Federal programs and activities; and, consequently, there was no need to include it in Title VI's coverage.[102] Clergy who testified before Congress expressly accepted a version of Title VI omitting religion.[103] Congress rationalized that, by excluding religious discrimination, it avoided "a good many problems."[104] Specifically, it was argued that:

> The aid now goes to sectarian schools and universities. Local sectarian welfare groups . . . do an excellent job. There is no religious discrimination, of course, amongst them. . . . For these reasons, the subcommittee and, I am sure, the full committee or the majority thereof deemed it wise and proper and expedient—and I emphasize the word "expedient"—to omit the word religion.[105]

### Programs Involving Contracts of Insurance and Guaranty

Title VI expressly excludes from coverage any programs involving contracts of insurance and guaranty.[106] The House incorporated this limitation into Title VI as an amendment to the Committee version. The basis for such exclusion was that some members of Congress feared that by attaching conditions of nondiscrimination to federally insured loans, savings, or farm prices, Title VI might become a tool for governmental control over the "affairs of individuals," especially in the area of housing.[107]

In particular, opponents feared that Title VI might be used to enforce an "open housing policy" through the use of federally sponsored home loans.[108] Because the Housing and Home Finance Agency was extensively involved in the financing of privately owned homes, they feared that Title VI might lead to forced desegregation of private housing patterns.[109] Consequently, the committee version excised the words "insurance" and "guaranty."

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[102] *See* Celeda, at 12–13 (quoting 110 Cong. Rec. 2379 (1964) (statement of Rep. Celler)).

[103] Ibid.

[104] Ibid.

[105] Ibid.

[106] 42 U.S.C. § 2000d-1 (1988) provides, in pertinent part: "Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract, other than a contract of insurance or guaranty, . . . ."

[107] *See Title VI*, at 837.

[108] *Id.*

[109] *See Federal Enforcement Effort*, p. 10.

However, opponents were not reassured, being unable "to ascertain any program involving Federal 'insurance' or 'guaranty' that [did] not involve a 'contract.'"[110] Since Title VI still applied to contracts, opponents believed that *contracts* of insurance and guaranty still fell within its scope. Consequently, the House bill proposed an amendment specifically excluding such *contracts* of insurance and guaranty from Title VI's scope.[111]

## Inclusions of Title VI

### Discriminatory Employment Practices

Title VI expressly prohibits discriminatory employment practices of Federal funding recipients only when the primary objective of the financial assistance program is the provision of employment.[112] This limitation was included as an amendment to the House version in the Senate Mansfield-Dirksen substitute. The original administration proposal had applied to employment practices of Federal funding recipients, regardless of whether the provision of employment was the primary purpose of the assistance program, when such practices adversely affected program beneficiaries or participants. Labor leaders enthusiastically endorsed withholding of funds for all discriminatory employment practices.[113] Nevertheless, the limitation was imposed because, at the time Title VI was enacted, Title VII of the Civil Rights Act of 1964 already extensively covered employment discrimination.[114]

The U.S. Department of Justice's coordination regulations define the employment practices covered by Title VI as those which (1) exist in a program where the primary objective of the financial assistance is to provide employment, or (2) cause discrimination on the basis of race, color, or national origin with respect to beneficiaries or potential beneficiaries of a Federal assistance program.[115] The former represents what is expressly proscribed by Title VI. However, the Department of Justice has appropriately interpreted Title VI to prohibit discriminatory employment practices that are also likely to result in a Title VI violation, regardless of whether the funding program's purpose is to provide employment.[116] This broader prohibition is necessary to ensure that discrimination does not occur in *any* aspect of a federally funded program.

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[110] *See* House Report, pt. 1, at 74–76 (Minority Report), *reprinted in* 110 U.S.C.C.A.N. 2444. *See also Title VI*, at 837; Celeda, at 13.

[111] *Title VI*, at 837–38; Celeda, at 13. However, Congress simultaneously intended that Title VI not preempt "existing agency powers to deal with discrimination in programs or activities *not* covered by Title VI," such as earlier executive order prohibiting discrimination in federally assisted housing. 110 Cong. Rec. 5408–09 (1964) (statement of Sen. Humphrey). Consequently, such concern of whether and to what extent Title VI would preempt then-existing Federal authority to prohibit discrimination in the use of Federal funds resulted in an amendment to ensure that Title VI in no way detracted from executive power derived from any other source. 42 U.S.C. § 2000d-4 (1988): "Nothing in this [Title] shall add to or detract from any existing authority with respect to any program under which federal financial assistance is extended by way of a contract of insurance or guaranty." *See Federal Enforcement Effort*, p. 10; *Title VI*, at 837–38; Celeda, at 20–22.

[112] 42 U.S.C. § 2000d-3 (1988) provides: "Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency or labor organization except where a primary objective of the federal financial assistance is to provide employment."

[113] *Title VI*, at 836 (citing Subcommittee Hearings, Part III, at 1786–88, 2095, 1381).

[114] 42 U.S.C. §§ 2000e–2000e-17 (1988 & Supp. V 1993). *See Title VI*, at 836–37. *See also Federal Enforcement Effort*, p. 11. In addition, there was some concern that regulation of employment practices could be used to regulate the ultimate beneficiary, contrary to the purpose of Title VI. *Title VI*, at 837.

Subsequently, the limited coverage of employment under Title VI was broadened under a set of uniform amendments to agency Title VI regulations. *See* 38 Fed. Reg. 17920–17997 (1973). *See also Federal Enforcement Effort*, p. 11. These amendments provided that even where employment was not a primary objective of Federal assistance, employment discrimination was prohibited in such assistance programs to the extent that it adversely affected intended program beneficiaries, participants, or the affected community. Ibid., pp. 11–12, 702–04. *See also Title VI*, at 836–37.

[115] 28 C.F.R. § 42.402 (1994).

The latter regulatory interpretation involves situations in which racially motivated employment decisions in the operation of any federally funded program adversely impact upon the program's beneficiaries, participants, or affected community. This interpretation extends Title VI to prohibit any employment discrimination that adversely affects racial or ethnic minorities' ability to benefit from or participate in federally funded programs and activities. For example, hiring, selection, or appointment practices within the administration of a particular program that adversely affect program beneficiaries constitute violations of Title VI.

This distinction is significant because Federal agencies often do not appreciate the Title VI implications of employment discrimination. Agencies generally only handle employment discrimination complaints as potential violations of Title VII of the Civil Rights Act of 1964. However, a discriminatory employment practice in the operation of a federally sponsored program that disparately impacts upon that program's beneficiaries may also be a Title VI violation. Therefore, while Title VII may provide a legal remedy for the direct victim of the discriminatory employment practice, it will not also address the Title VI violation, which is the discriminatory employment practice's ensuing effect upon the program's participants. This is a problem because the two civil rights provisions provide for different types of relief and sanctions: Title VI suspends program funding to the offending recipient, while Title VII provides remedy to the victim of the discriminatory employment practice.

Title VI and Title VII are equally important mechanisms for eradicating racial discrimination in the operation of federally funded programs and activities. As such, agencies must not ignore their responsibilities under both statutes. Hence, agencies must ensure that their Title VI implementing regulations protect both (1) program beneficiaries who are directly affected by discriminatory practices in programs that are intended to assist in securing them employment, and (2) participants and beneficiaries of any Federal program that are affected incidentally by employment decisions based upon race, color, or national origin.

Such an interpretation of Title VI's coverage is entirely consistent with case law. Historically, in the area of school desegregation, the Supreme Court has held that employment practices, such as issues related to "administration" and "personnel," affect the equal educational opportunity of students.[117] For example, in *Bradley v. School Board of Richmond*, the Court found that faculty allocation on a racial basis had a direct impact on efforts at eliminating student desegregation.[118] Moreover, in *Rogers v. Paul*,[119] the Court held that the racial allocation of faculty at the school in question denied that school's students equality of educational opportunity, regardless of the segregation of the students themselves.[120] Hence, the Court has maintained that, in considering whether the vestiges of *de jure* segregation had been eliminated, courts should look not only at student assignments, but to "every facet of school operations," including faculty and staff."[121] Policy and practice with regard to faculty and staff are "among the most important indicia of a segregated system."[122]

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[116] *Id.*

[117] Bradley v. School Board of Richmond, 382 U.S. 103, 104–05 (1965); Brown v. Board of Education, 349 U.S. 294, 300 (1955). The principle that segregation in the assignment of faculty is directly related to the problem of school segregation finds support in a wide range of Supreme Court decision. Knight v. Alabama, No. 83–M–1676–S, 1990 U.S. Dist. Lexis 19604, at *23 (S.D. Ala. Mar. 12, 1990) (stating that if the plaintiffs were successful in proving that respondent school system's administrative and faculty decisions were made on the basis of race, then it could not be disputed that such decisions must be eliminated in order to ameliorate the discriminatory effects on the students).

[118] 382 U.S. at 104–05.

[119] 382 U.S. 198 (1965).

[120] *Id.* at 200.

Lower courts have relied upon the same theory.[123] For example, in *Singleton v. Jackson Municipal Separate School Districts*,[124] the court held that to advance equal educational opportunities for students, it was "essential" for schools to make an "adequate start toward elimination of race as a basis for the employment and allocation of teachers, administrators, and other personnel."[125] In addition, in *Wheeler v. Durham Board of Education*,[126] the court interpreted the Supreme Court's decision in *Bradley* to mean that "the removal of race considerations from faculty selection and allocation is, as a matter of law, an inseparable and indispensable command within the abolition of pupil segregation in public schools . . . ."[127] The court stated that "[t]he only factual issue is whether race was a factor entering into the employment and placement of teachers."[128]

## Definition of Programs or Activities: The Application of Title VI's Nondiscrimination Policy to Entire Institutions

To ensure the broad, institutionwide application of Title VI and other civil rights statutes, Congress passed the Civil Rights Restoration Act of 1987.[129] This act clarifies the definition of "programs or activities" covered by the nondiscrimination provisions of civil rights statutes.[130] The revised definition states that discrimination is prohibited throughout an entire agency or institution, if any part of that agency or institution receives Federal financial assistance.[131] Congress introduced the Civil Rights Restoration Act in response to the Supreme Court's 1984 decision in *Grove City College v. Bell*.[132] In the Restoration Act, Congress sought to reaffirm legislatively the broader application of the statute that existed prior to *Grove City*.[133] The Civil Rights Restoration Act leaves intact the current exemption from Title VI for "ultimate beneficiaries" of Federal financial assistance, such as farmers receiving crop subsidies, individual recipients of food stamps, social security benefits, and medicare and medicaid benefits.[134]

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[121] Board of Educ. v. Dowell, 111 S.Ct. 630, 638 (1991).

[122] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 18 (1971).

[123] *See, e.g.*, Knight v. Alabama, 1990 U.S. Dist. Lexis 19604, at **20–25.

[124] 355 F.2d 865 (5th Cir. 1966).

[125] 355 F.2d at 870. *See also* Clark v. Board of Educ., 369 F.2d 661 (8th Cir. 1966).

[126] 363 F.2d 738 (4th Cir. 1966).

[127] *Id.* at 740.

[128] *Id.* For a summary of lower courts' decisions on the same, *see* United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *cert. denied*, 389 U.S. 840 (1967), *reh'g denied*, 389 U.S. 965 (1967). However, such a case requires that the complainant demonstrate a nexus between the discrimination against employees and its effect on beneficiaries of Federal financial assistance programs. *See, e.g.*, Islesboro Sch. Comm. v. Califano, 593 F.2d 424, 430 (1st Cir.), *cert. denied*, 444 U.S. 972 (1979) (Title IX).

[129] Pub. L. No. 100–259, 102 Stat. 28 (codified as amended at 20 U.S.C. §§ 1681note, 1687, 1687note, 1688, 1688note (1988); 29 U.S.C. §§ 706, 794 (1988 & Supp. V 1993); 42 U.S.C. §§ 2000d-4a, 6107 (1988)).

[130] U.S. Congress, Senate, Committee on Labor and Human Resources, *Civil Rights Restoration Act of 1987*, 100th Cong., 2d sess., S. Rep. No. 64, p. 1, *reprinted in* 1988 U.S.C.C.A.N. 3 (hereafter cited as CRRA Senate Committee Report). With respect to the definition of "program or activity," the Civil Rights Restoration Act amended the following statutes: Title IX of the Higher Education Amendments Act of 1972, 20 U.S.C. § 1687 (1988); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(b) (1988 & Supp. V 1993); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-4a (1988); and the Age Discrimination Act of 1975, 42 U.S.C. § 6107 (1988).

The broader application of Title VI's nondiscrimination policy is significant because the scope of Title VI application to Federal financial assistance programs and activities is related directly to the reach of each agency's rules and regulations prohibiting discrimination. In addition, the definition of "program or activity" affects the limits on the enforcement tools available to the agencies in the event that they cannot secure Title VI compliance voluntarily. Before *Grove City,* Federal agencies asserted broad regulatory authority to enforce Title VI institutionwide.[135] If a public or private entity received Federal assistance in any of its activities, the agencies would apply their nondiscrimination policies and regulations in all aspects of the organization.[136] For example, if a university's math department received Federal financial assistance, the university would have to ensure nondiscrimination in all of its operations and programs as a condition for receipt of Federal funds. Thus, through institutionwide regulatory coverage, agencies were able to prevent the Government from financially sponsoring any discriminatory activities.

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[131] CRRA Senate Committee Report, p. 4, 1988 U.S.C.C.A.N. 3, 6.
The Civil Rights Restoration Act defines "program or activity" under Title VI as follows:

> For purposes of this title, the term 'program or activity' and the term 'program' mean all of the operations of—
> (1) (A) a department, agency, special purpose district, or other instrumentality of a State or local government; or
> (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;
> (2) (A) a college, university, or other postsecondary institution, or a public system of higher education; or
> (B) a local educational agency (as defined in section 198(a) (10) of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system;
> (3) (A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—
> (i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or
> (ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or
> (B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or
> (4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);
> any part which is extended Federal financial assistance.

42 U.S.C. § 2000d-4a (1988). *See* Karen J. Lewis and Charles V. Dale, Legislative Attorneys, American Law Division, Congressional Research Service, The Library of Congress, *The Civil Rights Restoration Act of 1987: Legal Analysis of P.L. 100–259*. Rept. No. 88–171 A (July 12, 1988), p. 2 (hereafter cited as CRS, *Legal Analysis of P.L. 100–259*).

[132] 465 U.S. 555 (1984). The Supreme Court's decision in *Grove City* addressed the coverage and applicability of Title IX's prohibition on sex discrimination in programs receiving Federal financial assistance. In finding that Title IX coverage was limited to the specific program receiving Federal assistance, the Court built upon its earlier decision in *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 538 (1982). To facilitate its analysis in *Grove City*, the Court focused on the "purpose and effect" of the Federal financial assistance. 465 U.S. at 573. Because the student grants increase the funds available for financial aid, the Federal financial assistance enables the college to enroll students who otherwise would not be able to afford higher education. *Id.* at 573–74. Thus, Title IX applied only to the college's financial aid program that was subsidized, in effect, by Federal education grants distributed directly to students. *Id.* With the decision in *Grove City* the Court adopted program-specific coverage for Title IX, and by implication Title VI, instead of institutionwide applicability.

[133] *See* Pub. L. No. 100–259, § 2, 102 Stat. 28 (codified at 20 U.S.C. § 1687 (1988)). *See also* CRRA Senate Committee Report, p. 2, 1988 U.S.C.C.A.N. 3, 4. Although the congressional minority fought the passage of the Civil Rights Restoration Act of 1987, they agreed that the Court's decision in *Grove City* should be reversed legislatively. The Senate Judiciary Committee minority stated, "There is no disagreement within the Committee that we should not permit or subsidize discrimination against minorities, women, persons with handicaps or the aged. Nor does the controversy arise over whether the decision of the Supreme Court in *Grove City College v. Bell* should be reversed. We agree on that point as well." CRRA Senate Committee Report, p. 37, 1988 U.S.C.C.A.N. 3, 35.

[134] This exemption protects the beneficiaries of Federal financial assistance from discrimination, while releasing them from the Title VI obligations intended to cover recipients. *See* CRRA Senate Committee Report, p. 24–25, 1988 U.S.C.C.A.N. 3, 26–27.

Although the decision in *Grove City* temporarily narrowed Title VI coverage, Congress restored the implementation and compliance authority of the agencies. As a result, the agencies have the power to apply institutionwide their rules, regulations, and orders prohibiting discrimination pursuant to the nondiscrimination policy of Title VI.[137]

## Definition of Programs or Activities: The Application of Title VI's Enforcement Mechanism to Entire Institutions

The Civil Rights Restoration Act is significant not only because of its restoration of a broad application of Title VI's nondiscrimination policy, but also because of its effect on the enforcement mechanism available to Federal funding agencies, namely, the authority to terminate Federal assistance.[138] Title VI provides that recipient compliance with its requirements may be effectuated by the refusal to grant or continue financial assistance.[139] However, the termination or refusal of funding must be "limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found."[140]

The fifth circuit's decision in *Board of Public Instruction v. Finch* is the principal case interpreting the fund termination language of Title VI, as well as the other civil rights statutes.[141] In *Finch*, the fifth circuit held that a Federal agency may terminate funds to a recipient under two conditions:[142] (1) when the discrimination occurs specifically in the program or activity receiving those funds, otherwise known as the "pinpoint-

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[135] CRRA Senate Committee Report, p. 7, 1988 U.S.C.C.A.N. 3, 9; CRS, *Legal Analysis of P.L. 100-259*, pp. 2–3. Before and between the decisions in *North Haven* and *Grove City*, the lower courts were divided on the institutionwide coverage of the civil rights statutes and the reach of their implementing agency regulations. *See* Iron Arrow Honor Soc'y v. Heckler, 702 F.2d 549 (5th Cir. 1983), *vacated and remanded on different grounds*, 464 U.S. 67 (1983), *on remand*, 722 F.2d 213 (5th Cir. 1984); Board of Pub. Instruction v. Finch, 414 F.2d 1068 (5th Cir. 1969); United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *cert. denied*, Cadd Parish Sch. Bd. v. United States, 389 U.S. 840 (1967); Haffer v. Temple Univ., 524 F. Supp. 531 (E.D. Pa. 1981), *aff'd and remanded*, 688 F.2d 14 (3rd Cir. 1982); Bob Jones Univ. v. Johnson, 396 F. Supp. 597 (D.S.C. 1974), *aff'd without op.*, 529 F.2d 514 (4th Cir. 1975). *But see* University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982); Othen v. Ann Arbor Sch. Bd., 507 F. Supp. 1376, 1387 (E.D. Mich. 1981), *aff'd*, 699 F.2d 309 (6th Cir. 1983). Although the courts were divided on the issue of institutionwide coverage for all of the civil rights statutes, some courts distinguished the applicability of Title VI from the more restrictive application of Title IX. *See* CRS, *Legal Analysis of P.L. 100–259*, pp. 11–12. The institutionwide approach has been justified under Title VI based on the stricter scrutiny applied to race classifications than to sex classifications. *See* Othen, 507 F. Supp. at 1387.

[136] CRS, Legal Analysis of P.L. 100–259, pp. 2–3.

[137] Pub. L. No. 88–352, § 601, 78 Stat. 252 (codified at 42 U.S.C. § 2000d (1988)).

[138] *Id.* § 602, 78 Stat. 252 (codified at 42 U.S.C. § 2000d-1 (1988)).

[139] 42 U.S.C. § 2000d-1 (1988).

[140] *Id.*

[141] 414 F.2d 1068 (5th Cir. 1969). *See* CRRA Senate Committee Report, p. 20, 1988 U.S.C.C.A.N. 3, 22.

[142] 414 F.2d at 1078–79.

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ing" theory;[143] or (2) if the federally funded program of activity is affected by discrimination occurring elsewhere in the recipient's operations, otherwise known as the "infection" theory.[144]

Although the Civil Rights Restoration Act does not alter the enforcement language of Title VI that existed prior to *Grove City*, the legislative history confirms that Federal funds designated for a specific purpose may be terminated under either the "pinpointing" or "infection" theories, in the event that the agency cannot secure compliance voluntarily.[145] The reach of fund termination, including "infection" and effects of discrimination as well as "pinpointing," is important because it allows agencies to review federally assisted programs in context. By examining each federally assisted program in relation to the entire operation of the recipient, the agencies are able to determine if discrimination in a recipient's operations has a pervasive effect on the federally assisted program.[146] For example, the "infection theory" has been approved when used to show that "eliminating discrimination against students is impossible in the absence of eliminating discrimination against faculty."[147] Thus, the opportunity for students to have equal educational opportunities is denied when there is discrimination in faculty hiring.[148]

Although the courts and Congress explicitly permit fund termination when a federally assisted program is affected or tainted by discrimination in the recipient's operations, they have not established specific criteria necessary to demonstrate the link between discrimination in a recipient's operations and its effects on the federally assisted program.[149] In *Finch*, the fifth circuit indicated that the burden is on the agency seeking to terminate funds to illustrate "either that a particular program is itself administered in a discriminatory manner, or is *so affected* by discriminatory practices elsewhere in the school system that it thereby becomes discriminatory."[150] Moreover, although the courts have recognized the validity of the "infection" theory established in

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[143] "Pinpointing" refers to fund termination power that reaches only discrimination in programs which receive Federal financial assistance directly.

[144] The legislative history of the Civil Rights Restoration Act provides the following example of an "infected" program:

> In the case of *Grove City*, for example, if there is discrimination in the math department, a fund termination remedy would be available because the funds from BEOG's [Federal education grants for students] flow throughout the institution and support all of its programs.

CRRA Senate Committee Report, p. 20, 1988 U.S.C.C.A.N. 3, 22.

[145] *See* CRRA Senate Committee Report, p. 20, 1988 U.S.C.C.A.N. 3, 22. *See also* 42 U.S.C. § 2000d-1 (1988).

[146] *See* 414 F.2d at 1078–79.

[147] Isleboro Sch. Comm. v. Califano, 593 F.2d at 430 (citing United States v. Jefferson County Bd. of Educ., 372 F.2d at 884–86).

[148] 372 F.2d at 884.

[149] *See* CRS, *Legal Analysis of P.L. 100–259*, p. 29.

[150] 414 F.2d at 1079 (emphasis added). Most court decisions have supported the use of the "infection theory," but some have found that the agencies have failed to meet their burden sufficiently.

*Finch*, some courts have rejected "infection" claims because either the agency regulations involved were too broad, or the agency did not demonstrate adequately the "infection" relationship.[151]

## Private Right of Action

Title VI empowers Federal agencies to refuse funding to and terminate funding for any recipient found in violation of Title VI regulations, after an opportunity for an administrative hearing and voluntary compliance.[152] Although Title VI expressly provides for administrative enforcement only, lower courts have consistently recognized private suits, also known as private rights or causes of action, as a means of enforcing Title VI.[153] Courts have allowed such private individuals to initiate lawsuits under Title VI because, although fund termination may serve as an effective deterrent to recipients, it may leave the victim of discrimination without a remedy. Fund termination may eliminate entirely the benefit sought by the victim.[154]

Although some lower courts have explicitly decided that a private right of action exists,[155] most have addressed the merits of a Title VI case without making the initial determination of a plaintiff's right to bring the action.[156] The Supreme Court has never ruled directly on the issue of private enforcement actions under Title VI. However, the Court has granted relief to private plaintiffs under the statute. For example, in *Regents of University of California v. Bakke*,[157] the Supreme Court allowed an individual plaintiff to recover under Title VI, without deciding whether a private right of action might be implied.[158]

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[151] *See, e.g.*, Brown v. Sibley, 650 F.2d 760, 768 (5th Cir. 1981) (en banc); Seattle Univ. v. HEW, 621 F.2d 992, 994 (9th Cir. 1980), *vacated and remanded*, 456 U.S. 986, *on remand*, 684 F.2d 611 (9th Cir. 1982) (On remand, the ninth circuit held that, in light of the Supreme Court's decision in *North Haven Bd. of Educ. v. Bell*, HEW could issue Title IX regulations affecting employment practices in programs receiving Federal financial assistance.).

[152] 42 U.S.C. § 2000d-1 (1988). As discussed earlier, agencies must also provide a written report to the Congressional committee having jurisdiction over the assistance program at issue delineating the bases for fund termination. *Id*.

[153] *See, e.g.*, Neighborhood Action Coalition v. City of Canton, 882 F.2d 1012, 1015 (6th Cir. 1989); Larry P. v. Riles, 793 F.2d 969, 977 n.3 (9th Cir. 1984); Montgomery Improvement Ass'n v. United States Dep't of Hous. and Urban Dev., 645 F.2d 291, 294–97 (11th Cir. 1981); NAACP v. Medical Ctr., Inc., 599 F.2d 1247 (3d. Cir. 1979); Bossier Parish Sch. Bd. v. Lemon, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967); Soria v. Oxnard Sch. Dist., 386 F. Supp. 539 (C.D. Cal. 1974); Blackshear Residents Org. v. Housing Auth. of Austin, 347 F. Supp. 1138 (W.D. Tex. 1971); Hawthorne v. Kenbridge Recreation Ass'n, Inc., 341 F. Supp 1382 (E.D. Va. 1972); Gautreaux v. Chicago Hous. Auth., 265 F. Supp. 582 (N.D. Ill. 1967).

[154] *See. e.g.*, Cannon v. Univ. of Chicago, 441 U.S. 677, 705–06 (1979).

[155] *See. e.g.*, NAACP v. Medical Ctr., Inc., 599 F.2d 1247 (3d Cir. 1979); Bossier Parish Sch. Bd. v. Lemon, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967).

[156] *See. e.g.*, Serna v. Portales Mun. Schools, 499 F.2d 1147 (10th Cir. 1974).

[157] 438 U.S. 265 (1978) (plurality opinion) (the plaintiff challenged a university admissions policy that effectively established race-based quotas). Six opinions were filed in this case. Five justices agreed with Justice Powell that the plaintiff should be admitted. *Id*. at 271. The remaining four judges would deny admission, but agreed that race may be considered as a factor in admissions decisions. *Id*. at 272.

[158] Although *Bakke* was ultimately decided on Title VI grounds, the Court assumed the existence of a private right of action for purposes of the case and did not expressly decide whether the plaintiff was entitled to bring the action. The issue was neither argued nor decided in the lower courts, and was, therefore, not properly before the Court. 438 U.S. at 283.
Similarly, in *Lau v. Nichols*, the Court granted relief to the plaintiffs on the merits of their case without addressing the private right of action issue. 414 U.S. 563 (1974) (the plaintiffs challenged a requirement of proficiency in English language with no corresponding remedial instruction).

In addition, in *Bakke*, four judges, in a concurring opinion, expressly determined that a Title VI private right of action exists.[159] The concurring judges concluded that such implication would be proper and permitted, were the issue properly before the Court. The concurrence based its opinion on an analysis of the test pronounced in *Cort v. Ash*[160] for determining whether Congress intended to create a private right of action under a statute.

In *Cort v. Ash*, the Court developed four factors for determining whether a statute could be enforced through a private right of action. First: was the statute enacted for the benefit of a special class of which the complainant is a member?[161] Where the language of the statute explicitly confers a right or duty on a class of persons, the Supreme Court generally has endorsed implying a private right of action.[162] In *Bakke*, the concurring judges concluded that the language of Title VI confers a benefit on victims of racial discrimination.[163]

Second: did Congress explicitly or implicitly intend to create or deny a private remedy?[164] In statutes, such as Title VI, where the law clearly grants certain rights to a class of persons, an explicit intent to create a remedy is not necessary. However, an express intent to deny a private cause of action would be fatal to that implication.[165] The concurrence in *Bakke* concluded that the legislative history of Title VI, examined as a whole, indicated that Congress did not intend to deny a private right of action.[166]

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[159] 438 U.S. at 420–21 (Stevens, J. concurring and dissenting) Three other justices joined in the concurrence. Justice White adamantly denied the existence of a private right of action under Title VI. *Id.* at 380–87 (White, J., dissenting). In all, four judges held that Title VI authorized a private cause of action; four others assumed that it did; only Justice White believed that it did not.

[160] 422 U.S. 66 (1975).

[161] 422 U.S. at 78.

[162] 438 U.S. at 420 n. 28 (Stevens, J., concurring and dissenting).

[163] *Id.* The *Bakke* decision also considered the constitutional legitimacy of affirmative action in higher education. The most recent Supreme Court case addressing affirmative action is *Adarand v. Peña*, 63 U.S.L.W. 4523 (June 12, 1995), which held that affirmative action plans developed by Congress are subject to the same standard of review, strict scrutiny, as State and local affirmative action plans. Some people view the *Adarand* decision as sharply restricting affirmative action, by applying the strict scrutiny standard to any classification that uses race as a basis for decisionmaking. Others note that the court extended the strict scrutiny test, applicable to State and local programs since 1989, and acknowledged that the persistence of discrimination in our country may justify the use of race-conscious remedies in certain situations. This Commission report, however, does not address the issue of affirmative action or disputed questions of whether or how the *Adarand* decision might apply to Title VI enforcement. Future Commission reports will assess both the *Adarand* decision and Federal affirmative action programs.

[164] 422 U.S. at 78.

[165] 422 U.S. at 82.

[166] Bakke, 438 U.S. at 420 n.28. (Stevens, J., concurring and dissenting). The dissent disagreed, contending that the legislative history of Title VI did not evince an explicit intention to foreclose such an implication. *Id.* at 381–82 (White, J. dissenting).

Third: would a private right of remedy frustrate the underlying purpose of the legislative scheme.[167] The *Bakke* concurrence argued that Title VI involved personal rights and was drafted for a remedial purpose which would be hindered significantly without a private remedy to complement the agency procedures.[168]

Fourth: is the subject matter at issue traditionally a State concern?[169] The concurring judges in *Bakke* concluded that Title VI obviously was not an exclusive State concern, because Title VI rights are federally created, and the expenditure of Federal funds justifies the prohibition against using such funds to further racial discrimination.[170]

Although the Supreme Court has not expressly decided whether Title VI authorizes a private right of action, it has *implied* such a right. In *Cannon v. University of Chicago*,[171] an action brought under Title IX of the Higher Education Amendments Act of 1972,[172] the Court concluded that individuals injured by discriminatory practices of Federal funding recipients could maintain an action directly against recipients, rather than navigate the administrative procedures of the funding agency to terminate recipients' funding.[173] The Court provided two rationales for permitting private actions. First, the administrative procedures of the funding agency generally exclude the injured individual from participation after filing a complaint.[174] Second, Title VI regulations do not provide complainants a direct remedy, since agency authority is limited to termination of funding to the recipient.[175] Lower courts have consistently applied the ruling in *Cannon* to Title VI cases.[176]

In 1986 Congress added a section to Title VI providing that States are not immune from suit for violation of Title VI.[177] By referring to remedies available at law and in equity, the language of the provision indicates that Congress intended to permit a private right of action under

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[167] 422 U.S. at 78.

[168] 438 U.S. at 420 n. 28. (Stevens, J., concurring and dissenting). Again, the dissent disagreed, arguing that Congress intended the statute to be enforced only through administrative process. The dissent stated that Title VI's procedural safeguards indicated that Congress did not intend to allow a private party to circumvent such process. The dissent also argued that the inclusion of explicit provisions for private rights of action in Titles II and VII of the same Act further precluded implying the same right under Title VI. *Id.* at 381–83 (White, J., dissenting).

[169] 422 U.S. at 78.

[170] 438 U.S. at 420–21 n.28 (Stevens, J., concurring and dissenting).

[171] 441 U.S. 677 (1979).

[172] 20 U.S.C. §§ 1681–1688 (1988). Although this case involved Title IX, rather than Title VI, the Court looked to the regulations, case law, and legislative history of Title VI to interpret Title IX, because Title VI served as a model for legislating Title IX. Specifically, "[a] major part of the analysis was that Title IX had been derived from Title VI, that Congress understood that private remedies were available under Title VI, and that Congress intended similar remedies to be available under Title IX. Furthermore, it was the unmistakable thrust of the Cannon Court's opinion that the congressional view was correct as to the availability of private actions to enforce Title VI." Guardians Ass'n v. Civil Service Comm'n, 463 U.S. 582, 594 (1983) (citing Cannon, 441 U.S. at 694–703, 710–16.)

[173] 441 U.S. at 696–703.

[174] *Id.* at 706–08 n. 41 (citations omitted).

[175] *Id.*

[176] *See, e.g.*, Neighborhood Action Coalition v. Canton, 882 F.2d at 1015; Larry P. v. Riles, 793 F.2d at 977 n.3; Montgomery Improvement Ass'n v. United States Dep't of Hous. & Urb. Dev., 645 F.2d at 294–97.

[177] Rehabilitation Act Amendments of 1986, Pub. L. No. 99–506, title X, § 1003, 100 Stat. 1845 (codified at 42 U.S.C. § 2000d-7 (1988)).

Title VI.[178] According to the Department of Justice, this congressional codification of a private right of action should prevent any relitigation of the issue.[179]

## Coordination of Federal Title VI Enforcement

Effective implementation and enforcement of Title VI should convince a recipient that (1) the financial assistance provided by the program is essential to the operations of the recipient's program; (2) voluntary compliance with the agency's Title VI regulations will allow the recipient to receive and retain Federal financial assistance; and (3) the assistance will be withheld if discrimination exists in its program, or if discrimination elsewhere in its operations affects the program.[180]

The primary goal of Title VI is to ensure equal access to the benefits of federally assisted programs and to prevent the Government from participating indirectly in discriminatory programs through its financial support of those activities.[181] Although all funding agencies share this ultimate goal, the diversity of their programs and recipients makes it difficult to monitor the quality of each agency's implementation and enforcement efforts. Since the inception of Title VI, the Federal Government has faced the challenge of providing uninterrupted financial support to recipient programs serving the needs of beneficiaries, while also ensuring that those recipients do not discriminate against the beneficiaries they serve.

Therefore, the most important challenge is to establish and maintain a consistent and effective mechanism for coordinating the Title VI enforcement efforts of the affected Federal agencies, each of which is charged with enforcing the law with respect to its own recipients. Coordination of Title VI implementation and enforcement is complicated by the number and diversity of agency programs. Coordination of enforcement efforts may be hindered by conflicting interpretations and priorities of different Federal agencies.[182] Moreover, agencies, typically resentful of intrusion by other agencies, may be reluctant to coordinate their activities, adhere to each others' interpretations, or relinquish any enforcement responsibility. Alternatively, other agencies' enforcement efforts under Title VI may provide an agency with a basis for evading any enforcement responsibilities.[183] This is particularly true when agencies sign delegation agreements to share Title VI responsibility, but fail to delineate responsibility in the event that there is overlap or conflict in program jurisdiction.

Coordination of Title VI enforcement efforts among the affected agencies is particularly important given that many recipients receive funds from more than one agency. Without effective coordination and monitoring, a recipient could compensate for the loss of funds terminated by one agency by obtaining additional funds from another agency. This type of evasion would remove the financial incentive to comply with Federal nondiscrimination policy.[184] Additionally, if agencies set different standards for meeting the requirements of Title VI, or do not set any regulatory or policy standards for ensuring nondiscrimination, then a recipient desiring to comply with Title VI would not know how to meet the statutory requirements. Similarly, a recipient desiring to violate Title VI could use the inconsistency of standards to its own advantage. The recipient either could continue to discriminate while the agencies resolve their differences or could claim to comply with Title VI when in fact it did not comply with the nondiscrimination requirements.[185]

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[178] 42 U.S.C. § 2000d-7(a)(2)(1988).

[179] Deval L. Patrick, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, letter to Mary Frances Berry, Chairperson, U.S. Commission on Civil Rights, Apr. 28, 1995.

[180] *See Title VI*, p. 843.

[181] 42 U.S.C. § 2000d (1988). *See also* H.R. Doc. No. 124, 88th Cong., 1st sess., 1963, p. 2, *reprinted in* 110 U.S.C.C.A.N. 2392.

[182] *Title VI*, p. 843.

[183] Ibid.

[184] Ibid.

Since the objective of Title VI can be achieved only if recipients are convinced that disparate treatment of beneficiaries will be financially detrimental, a failure of the agencies to act uniformly may undermine their enforcement efforts.[186] Yet, if agencies agree to accept basic standards and procedures for the implementation and enforcement of Title VI, duplicate enforcement efforts may be eliminated.

## Efforts at Enforcement Coordination

Congress sought to achieve consistency in implementation and enforcement of Title VI by requiring each covered agency to issue "rules, regulations, or orders of general applicability," and by requiring their approval by the President.[187] To further promote uniformity, the Department of Justice assisted in drafting the initial regulations by issuing a guide containing specific policy statements regarding the goal of Title VI and the procedure to be followed for establishing noncompliance.[188] Although affected agencies submitted proposed regulations within the time frame set forth by the Department of Justice, the regulations proposed were so contradictory that a task force was created to work out a consistent framework.[189] The task force initially completed regulations for the Department of Health, Education and Welfare. These regulations were used as a model for regulations submitted by the other agencies. After 6 months of drafting and redrafting, agencies' regulations were approved by the President and published in the *Federal Register*.[190]

Although effectiveness of enforcement efforts would depend partly on how recipients responded to the requirements imposed by the new regulations, Title VI's ultimate success hinged on how well the agencies would be able to function together under the regulations. "In this regard, proper recognition was given to the fact that some coordinating mechanism would continue to be necessary; even given an almost identical framework, the degree of dedication of each agency could differ and the interpretation given the regulations by each agency could conflict, thus undermining the impact of Title VI."[191]

### The President's Coordination Council

Recognizing that the enactment of Title VI had created "a problem of coordination," Vice President Humphrey recommended the implementation of "facilities for consultation and cooperation at all levels of the Federal Government, and with other public and private groups as well."[192] Humphrey proposed the establishment of a group, not to "carry an operational burden, but rather . . . to offer leadership, guidance, support, advance planning, evaluation, and advice to foster and increase individual agency effectiveness, cooperation and coordination."[193] Humphrey advised that "present circumstances [did] not appear to require the creation of a new civil rights agency or the appointment of a single 'czar' with overriding authority to compel or direct specific agency action."[194] Instead, reliance should be placed upon each agency's using its own resources and reserving operational responsibility.[195]

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[185] Ibid., p. 845.

[186] Ibid.

[187] 42 U.S.C. § 2000d-1 (1988).

[188] 28 C.F.R. § 50.3 (1994).

[189] *See Title VI*, p. 846. *See also* U.S. Commission on Civil Rights, *Title VI One Year After* (1966), p. vii.

[190] *See Title VI*, p. 846.

[191] Ibid., p. 857, *quoting* Vice President Humphrey, speech before the U.S. Commission on Civil Rights, National Conference on Equal Opportunity in Federally Assisted Programs, Jan. 28, 1965.

[192] Allan Wolk, *The Presidency and Black Civil Rights* (1971), p. 178 (hereafter cited as Wolk).

[193] Hubert H. Humphrey, Vice President-elect, "Report to the President on the Coordination of Civil Rights Activities in the Federal Government," Jan. 4, 1965, box 403, EX FG 731, 15, WHCF, LBJL.

Accordingly, only 7 months after the passage of Title VI in 1964, President Johnson issued Executive Order 11,197, establishing the President's Council on Equal Opportunity.[196] The order appointed Vice President Humphrey chairperson of the Council and designated 16 agency, commission, and department heads to serve on the Council.[197] The Council was intended to initiate an information flow from the agencies to a centralized unit through regular reports and meetings to resolve common problems. It would thereby serve as a forum through which agencies could develop procedures for coordinating their Title VI enforcement efforts.[198] However, the Council was not established to compel the agencies to act.[199]

Six months after the Council was created, it was abolished, and responsibility for coordination was assigned to the Attorney General.[200] Several factors contributed to the transfer. President Johnson explained that:

> The departments and agencies . . . in cooperation with the President's Council on Equal Opportunity, [had] embarked on a coordinated program of enforcement of the provisions of that Title; . . . the issues hereafter arising . . . [would] be predominately legal . . . Therefore . . . the Attorney General [should] assist Federal Departments and Agencies to coordinate their programs and activities and adopt consistent and uniform policies, practices and procedures.[201]

The statement that agencies had embarked on a coordinated enforcement program was not completely accurate. The Council had developed a set of guidelines on coordinated Title VI enforcement action for the Department of Health, Education and Welfare; however, the guidelines never had been issued and the coordination plans had not been signed by the participating agencies at the time of the Council's abolition.[202] Moreover, the statement that future coordination issues would be predominately legal in character was mistaken. Determinations regarding the scope of Title VI and the development of such matters as uniform compliance standards certainly involved legal considerations. However, the ultimate success of Title VI enforcement efforts depended upon the willingness of agencies to coordinate effective implementing actions.[203]

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[194] Ibid.

[195] Ibid. pp. 161–62. *See also* Wolk, pp. 178–79; *Federal Enforcement Effort*, pp. 649–50.

[196] Exec. Order No. 11,197, 3 C.F.R. 278 (1964–1965), *revoked by* Exec. Order No. 11,247, 3 C.F.R. 348 (1964–1965), *superseded by* Exec. Order No. 11,764, 3 C.F.R. 849 (1971–1975), *revoked by* Exec. Order No. 12,250, 3 C.F.R. 298 (1981), *reprinted in* 42 U.S.C. § 2000d-1 (1988).

[197] *See Title VI*, pp. 857–58 ("By thus requiring the appointment of officials who were in responsible enough positions to commit their agencies by their policy decisions, the Order in effect forced the involved agencies to select representatives who could serve as internal and external coordinators of civil rights affairs. It encouraged and perhaps necessitated the development of civil rights organizations in the agencies that could effectuate the Regulations, circulate civil rights information within the agency, develop a broad enough perspective to view Title VI in conjunction with other civil rights activities, and work with the program people to develop plans for Title VI implementation.").

[198] *See* Wolk, pp. 180–81.

[199] *See* ibid. Department of Justice officials differed concerning what type of coordinating mechanism should be put in place. There were two schools of thought: the "LeRoy Collins approach" and the "Norbert Schlei approach." The former desired a coordination "czar" who would be provided with sufficient staff and authority to ensure that civil rights enforcement would be achieved. Proponents of this approach called for centralization of the many aspects of enforcement into a single unit. However, proponents of the "Norbert Schlei approach" favored a decentralized approach. They preferred to allow each department or agency handle its own Title VI activities. Ibid.

[200] *See Federal Enforcement Effort*, p. 651 ("The Council 'never got off and running' . . . Its ties to the President's staff were not close, and conflicts arose."(quoting Wiley Branton, former Director, President's Council on Equal Opportunity, interview, Apr. 6, 1970)).

[201] Exec. Order No. 11,247, 3 C.F.R. 348 (1964–1965), *superseded by* Exec. Order No. 11,764, 3 C.F.R. 849 (1971–1975), *revoked by* Exec. Order No. 12,250, 3 C.F.R. 298 (1981), *reprinted in* 42 U.S.C. § 2000d-1 (1988).

[202] *See Federal Enforcement Effort*, pp. 652–53.

### Executive Order 11,247

Executive Order 11,247 formally assigned Title VI enforcement coordinating authority to the Attorney General and revoked Executive Order 11,197.[204] The new order conferred on the Attorney General basically the same responsibility and power that had belonged to the President's Council. That responsibility included assisting Federal agencies in coordinating their programs and activities and adopting uniform policies, practices, and procedures for enforcement of Title VI.[205] The order empowered the Attorney General to promulgate such rules and regulations as he might deem necessary to carry out the responsibility assigned by the order. The order also directed all departments and agencies to cooperate with the Attorney General and to provide requested material and information.[206]

However, the order failed to include several critical provisions. First, it did not require agencies to designate a full-time official of a high rank to direct agency efforts and to serve as a liaison with the Department of Justice.[207] Second, the order neglected to set dates for accomplishment by the Department of Justice of its coordination tasks. Finally, because the order only conferred on the Attorney General the responsibility of assisting agencies to adopt and coordinate enforcement policies, the Attorney General did not construe this responsibility as providing authority to compel agencies to act under Title VI. To the contrary, the Attorney General perceived the Department of Justice's coordination obligation to be merely "a moderating force which keeps civil rights enforcement at a steady and even speed."[208] The Attorney General "felt that he could not tell other Cabinet heads what to do. He could not, for example, 'police the [D]epartment of Agriculture,' because the secretary of that department was equal in position to him. . . . [He had] the power of persuasion; otherwise [he had] no power."[209] As former Attorney General Ramsey Clark stated, "more often than not [the Department of Justice] assumed a restraining role in its interdepartmental relations."[210] The Attorney

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[203] *See Title VI*, p. 859 ("While it is questionable whether the Council had in fact served its purpose or whether other reasons existed for its abolition, it is true that there was less need for the Council, since anticipated problems did not require regular meetings of high-level policy makers for their resolution. Future problems would be associated with the methods of investigation, obtaining voluntary compliance, and establishing evidence to prove discrimination at hearings. There was nothing to suggest, however, that the problems would be purely legal, nor that there was no longer need for some organ modeled after the Council, such as an independent coordinator. Nevertheless, the method chosen was an office established in the Justice Department to coordinate Title VI activities within the Federal government."). *See also Federal Enforcement Effort*, pp. 652–53.

[204] Exec. Order No. 11,247, 3 C.F.R. 348 (1964–1965).

[205] *See Federal Enforcement Effort* p. 654, citing Exec. Order No. 11,247, § 1.

[206] *See* ibid., pp. 655–57, citing Exec. Order No. 11,247, §§ 1, 2.

[207] Ibid., pp. 655–56.

[208] Wolk, p. 205.

[209] Ibid., p. 195, quoting from interview with Ramsey Clark.

[210] Ibid, p. 189.

General's prior reluctance to police the funding agencies represented one of the "unofficial" reasons for later providing the Attorney General with coordination authority for all the agencies with Title VI responsibilities.

### Executive Order 11,764

In early 1974, President Richard Nixon signed Executive Order 11,764, revoking Order 11,247. This new order (1) directed that agencies extending financial assistance had primary responsibility for effectuating Title VI, and (2) clarified and broadened the role of the Attorney General. It directed the Attorney General to "coordinate" agency enforcement of Title VI, rather than merely to "assist" agencies "to coordinate."[211] The order also directed the Attorney General to adopt minimum standards and procedures for the implementation of Title VI, including investigations, compliance reviews, and steps to secure voluntary compliance.[212] Agencies were mandated to act "in accord with" these standards and procedures.[213] The order also preserved the power in Executive Order 11,247 of the Attorney General to issue necessary rules and regulations for carrying out his functions, and added to it the power to issue orders.[214] Also retained was a provision mandating that the agencies "cooperate with the Attorney General in the performance of his functions under this order."[215] Finally, the order delegated to the Attorney General the President's authority to approve Title VI agency regulations.[216] The new provisions represented significant improvements over Executive Order 11,247. For example, the power to issue minimum requirements for implementation of Title VI embodied great potential for effecting a uniformly high quality of agency enforcement efforts.[217] However, again, the President's directive neglected to include language from which the Attorney General might derive the authority to compel agencies to fulfill their responsibilities under Title VI.

### Executive Order 12,250

In November 1980, President Carter issued Executive Order 12,250 revoking Executive Order 11,764. Like Executive Order 11,764, Executive Order 12,250 provides the Attorney General with the authority vested in the President by Title VI to approve all agency rules, regulations, and orders.[218] The order further requires the Attorney General to "review the existing and proposed rules, regulations, and orders" of the Federal agencies affected by Title VI "in order to identify those which are inadequate, unclear or unnecessarily inconsistent."[219] The order further directs the Attorney General to issue guidelines for establishing reasonable time limits on such measures as securing voluntary compliance, initiating sanctions, and referring cases of noncompliance to the Department of Justice.[220]

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[211] *See Federal Enforcement Effort*, pp. 657–58, citing Exec. Order No. 11,764, § 1.

[212] Ibid., p. 658, citing Exec. Order No. 11,764, § 1 and 2(b).

[213] Ibid., citing Exec. Order No. 11,764, § 2(c). These provisions were "significant improvements" over Executive Order 11,247. By providing the Attorney General with the authority to issue minimum requirements for investigating and enforcing Title VI, the Department of Justice had the potential to ensure consistent, high quality Title VI enforcement, and to develop and improve methods for detecting, measuring, and remedying discrimination and inequity in provision of services.

[214] Ibid., citing Exec. Order No. 11,764, § 1.

[215] Ibid., p. 659, citing Exec. Order No. 11,764, § 2(a).

[216] Ibid., citing Exec. Order No. 11,764, § 3 (The new order conferred "unprecedented management authority on the Attorney General in the area of Title VI coordination.").

[217] Ibid., p. 658.

[218] Exec. Order No. 12,250, § 1–101, 3 C.F.R. 298 (1981), *reprinted in* 42 U.S.C. § 2000d-1 (1988). This order also applies to Title IX of the Higher Education Amendments Act of 1972, Section 504 of the Rehabilitation Act of 1973, and "any other provision of Federal statutory law which provides . . . that no person in the United States shall, on the ground of race, color, national origin, handicap, religion, or sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance."

To effect these coordination responsibilities, the order mandates that the Attorney General "promptly prepare a plan for the implementation of this order."[221] It also directed the Attorney General to establish and implement a schedule for reviewing agencies' regulations.[222] The order instructs the Attorney General to establish specific guidelines and standards on a variety of topics, such as developing consistent and effective recordkeeping and reporting requirements; sharing and exchanging compliance records, findings, and relevant documentation; developing comprehensive employee training programs; developing effective information programs; and developing cooperative programs with State and local agencies.[223] Executive Order 12,250 also requires the Attorney General to initiate "cooperative programs between and among agencies."[224] The order further directs the Attorney General to "periodically evaluate the implementation of the nondiscrimination provisions" of affected statutes and advise the heads of the relevant agencies of the results of such evaluations and recommendations for improvements in implementation and enforcement efforts.[225] To facilitate cooperation and coordination among the agencies, the order requires the Attorney General to carry out responsibilities "in consultation with" the affected agencies.[226] It further requires the Attorney General to report annually to the President on the Department of Justice's progress towards achieving the goals of Executive Order 12,250. The annual report should include the Attorney General's recommendations for changes in implementation and enforcement efforts.[227]

The order directs agencies to "cooperate" with the Attorney General and to furnish reports and information as might be requested.[228] It also requires each agency to "issue appropriate implementing directives" "consistent with the requirements prescribed by the Attorney General" and "subject to the approval of the Attorney General."[229] The order further instructs each agency to submit plans for implementing its responsibilities within 60 days after the date set by the Attorney General.[230]

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[219] Exec. Order No. 12,250, § 1-202, 3 C.F.R. 298 (1981), *reprinted in* 42 U.S.C. § 2000d-1 (1988).

[220] *Id.* § 1-204.

[221] *Id.* § 1-301.

[222] *Id.* § 1-205.

[223] *Id.* § 1-206.

[224] *Id.* § 1-207.

[225] *Id.* § 1-302.

[226] *Id.* § 1-301.

[227] *Id.* §§ 1-303, 1-304. Section 1-305 provides that the Attorney General will serve as chair in the Interagency Coordinating Council established by Section 507 of the Rehabilitation Act of 1973, 29 U.S.C. 794(c) (1988).

[228] Exec. Order No. 12,250, § 1-401.

[229] *Id.* § 1-403.

[230] *Id.* § 1-403. Section 1-501 provides that 28 C.F.R. §§ 42.410-42.415, regarding the Department of Justice's coordination of enforcement of Title VI, shall remain in effect until revoked or modified. Executive Order 12,250 resulted in the creation of the Office of Coordination and Review, within the Department of Justice's Civil Rights Division. The office is responsible for coordinating and reviewing agencies' Title VI enforcement policies and regulations.

## Division of Executive Authority and Responsibility Under Title VI

### The Department of Justice

Present authority and responsibility for coordinating Title VI implementation and enforcement efforts remains vested in the Attorney General under Executive Order 12,250. Although the order assigns implementation and enforcement of Title VI primarily to each agency extending Federal financial assistance, the Department of Justice's Coordination and Review Section, through the Assistant Attorney General in charge of the Civil Rights Division, has the responsibility of ensuring that such agencies meet their Title VI responsibilities.

The Coordination and Review Section serves an ongoing coordination function with respect to affected agencies. As part of that function, it is required to provide guidance to agencies relative to their Title VI implementation and enforcement policies and practices. As a complement to attorneys and paralegals, the Section is staffed with professionals designated as "coordinators." The coordinators' function is to oversee and monitor agency Title VI enforcement efforts, and provide technical assistance to those agencies, as necessary, to ensure uniform enforcement.

### Title VI Agencies

In enacting Title VI, Congress explicitly established a national policy against discrimination in federally assisted programs and activities. As evidenced by the statute, Congress intended that the policy be implemented through administrative rulemaking.[231] To define the scope of Title VI's antidiscrimination principle, Congress mandated agencies to promulgate standards, in the form of rules, regulations, and orders, governing the administration of Title VI.[232] Congress thereby vested Federal agencies with the power to define the discrimination forbidden by Title VI.[233]

The requirement that agencies develop such standards represented part of a compromise between proponents and opponents of Title VI.[234] That compromise was necessary "to reconcile seemingly irreconcilable views concerning whether [T]itle VI should reach only de jure discrimination or de facto discrimination as well."[235] As such, "[t]he key to the compromise was the decision to authorize the . . . agencies to adopt their own regulations for enforcement of the general antidiscrimination clause."[236] In particular,

> [a]n examination of the legislative history of [T]itle VI . . . shows that . . . "Discrimination" in section 601 is no vague term to be defined once authoritatively and frozen into law; rather it is a broad term that Congress deliberately chose to provide a basis for an evolving agency policy expressed through administrative rulemaking authority.[237]

### Fund Termination

Another component of the compromise was to afford agencies some flexibility in enforcing Title VI.[238] As one means of enforcement, Congress expressly vested agencies with the power to discontinue financial support to funding recipients found to be in noncompliance.[239] From its introduction, Title VI did not make the termination of Federal assistance mandatory.[240] It merely provided that agencies were not *required* to extend financial assistance to programs or activities administered in a discriminatory manner.[241] However, it subsequently became clear that termination of funding was necessary as a means of enforcement. Otherwise, agencies might be discouraged from taking enforcement action,[242] or the policy might be subject to abuse of discretion by agencies.[243]

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[231] *See* 42 U.S.C. § 2000d-1 (1988). *See also* Abernathy, p. 41.

[232] *See, e.g.*, 110 Cong. Rec. 13,126 (1964) (statement of Sen. Gore) (The House version left doubt as to whether agencies were required to issue rules and regulations; however, the Dirksen-Mansfield substitute replaced "may" with "shall," mandating the issuance of such standards.).

[233] *See* Abernathy, p. 3. Congress adopted neither an affects nor an intent test for discrimination; rather, it authorized agencies to make the choice through regulations, thereby providing them the power to define the discrimination forbidden by Title VI. *See also Title VI*, p. 834.

[234] Abernathy, p. 28.

[235] Ibid.

[236] Ibid.

[237] Ibid., p. 41.

[238] Ibid., p. 29.

Nevertheless, controversy surrounded the decision to make the language mandatory.[244] First, opponents argued that this type of executive power contradicted the administration's intent.[245] They contended that President Kennedy had not believed that he had the power to terminate funds in a "general way" and felt it unwise to provide any president with such authority.[246] Second, opponents were concerned that Title VI provided the Executive branch with unprecedented and unbridled power to control the allocation of Federal funds, a function constitutionally delegated to Congress.[247] Third, opponents feared that fund termination would potentially hurt the very beneficiaries that Federal assistance programs aimed to serve.[248] Finally, opponents of Title VI did not want the agencies to have the authority to terminate funds either to an entire State, when discrimination existed only in one geographical area, or to one program when discrimination existed only in another.[249]

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[239] "[A]ny other means authorized by law" includes agency suits to enforce contractual nondiscrimination provisions and compliance with agency regulations, as well as suits brought by the Department of Justice under Title VI, where the recipient is a public entity. *See, e.g.* 28 C.F.R. § 50.3 (1994); 29 C.F.R. § 100.8(d) (1994).

[240] *See* 110 Cong. Rec. 6546 (1964) (statement of Sen. Humphrey); *id.* at 1501 (statement of Rep. Willis).

[241] *See id.* at 6546 (statement of Sen. Humphrey). *See also* Celeda, p. 6 (the original version of Title VI contained little more than the Presidential message and in it cut-off of funds was discretionary).

[242] *See, e.g.*, Subcommittee Hearings, Part III, at 2244 (statement of Rep. Kastenmeir). *See also Title VI*, at 835.

[243] *See e.g.*, 110 Cong. Rec. 2481 (1964) (statement of Rep. Ryan) ("For those who are so alarmed about this discretion placed in the hands of the [F]ederal administrators and department heads, I would encourage them to support an amendment to make mandatory the denial of funds for segregated programs. Then they would not have to worry about the use of discretion.").

[244] *See, e.g.*, House Report, Part 1, at 65–66, 110 U.S.C.C.A.N. 2434 (Minority Report) (Title VI of the Committee bill "[a]mends every [F]ederal statute setting up or appropriating money for any program or activity involving Federal financing by a mandatory requirement that every Federal department and agency 'shall take action to effectuate' the purposes of the [A]ct. . . . This makes available to the President and . . . the Attorney General, enormous and unlimited funds for sociological manipulation in the field of civil rights." (emphasis added)); *id.* at 114–17, 110 U.S.C.C.A.N. 2480–84 (Minority Report) (additional views of Hon. William C. Cramer). *See also* 110 Cong. Rec. 1588 (1964) (statement of Rep. Tuck); *id.* at 1532 (statement of Rep. Willis).

[245] *See, e.g.*, 110 Cong. Rec. 2480 (1964) (statement of Rep. Flynt); *id.* at 477 (statement of Rep. Mathews); *id.* at 2464 (statement of Rep. Poff); *id.* at 2466 (statement of Rep. Elliot).

[246] *See, e.g.*, *id.* at 2490 (statement of Rep. Boggs); *id.* at 2464 (statement of Rep. Poff); *id.* at 2463 (statement of Rep. Whitener); House Report, Part 1, at 102, 110 U.S.C.C.A.N. 2469 (Minority Report) (additional views of Hon. William Cramer). *Cf.*, 110 Cong. Rec. 7067–68 (1964) (statements of Sens. Pastore and Ribicoff) (explaining that President Kennedy's statement concerning terminating funds in a "general way" was directed at terminating funds to an entire State without regard to the particular geographical area or assistance program in which discrimination had occurred—in other words, the President was opposed to "blanket withdrawal of federal expenditures from a State," and not fund termination *per se.*); *see also id. at* 8361 (statement of Sen. Eastland); *id.* at 8627 (statement of Sen. Humphrey); *id.* at 8424 (1964) (statement of Sen. Ribicoff).

[247] *See, e.g.*, *id.* at 8630 (statement of Sen. Sparkman); *id.* at 8359 (statement of Sen. Eastland); *id.* at 2498 (statement of Rep. Seldon); *id.* at 2498 (statement of Rep. Long); *id.* at 2469 (statement of Rep. Dowdy); *id.* at 2463 (statement of Rep. Whitener). *See also id.* at 13,332 (1964) (statement of Sen. Gore) ("I think it is the responsibility of the legislative branch . . . to prescribe the conditions under which Federal aid is extended. If we surrender this responsibility to the Executive, . . . [w]e will have delegated to the Executive an important part of the legislative function and we will have seriously limited a source of legislative power, control over the purse strings."). *See* U.S. CONST. art. I, § 8.

In response to each of these concerns, sponsors of the legislation maintained that the goal was to end discrimination, not to deny Federal financial assistance. Therefore, the final language of Title VI requires agencies to take proactive steps to achieve voluntary compliance and to employ fund termination only as a last resort.[250] Accordingly, the final version of Title VI, in addition to allowing agencies to terminate funds, provides for procedural safeguards to protect recipients and beneficiaries from financial detriment and abuse of agency discretion.[251]

### Procedural Safeguards Against Agency Indiscretion

One such safeguard was the mandate that agencies promulgate standards governing the administration of Title VI.[252] This provision was intended to guarantee the development of consistent standards of nondiscrimination.[253] Another safeguard was the requirement that all agency standards receive presidential approval before taking effect.[254] By subjecting agency standards to the approval of the President, Congress intended to ensure the promulgation of consistent standards of nondiscrimination[255] and induce political accountability for those standards.[256] Another safeguard was the mandate that agency standards not frustrate the objectives of the underlying assistance program.[257] This provision was intended to limit the possibility of any adverse effect on beneficiaries from an agency enforcement action.[258]

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[248] *See, e.g.*, 110 Cong. Rec. 2490 (1964) (statement of Rep. Boggs); *id.* at 1616 (statement of Rep. Ashemore); *id.* at 2483 (statement of Rep. Downing); *id.* at 2498 (statement of Rep. Willis). *See also id.* at 2463 (In response to a suggestion by the United States Commission on Civil Rights that he should terminate Federal assistance to the State of Mississippi because it refused to desegregate its schools, President Kennedy had stated that "in many instances the withholding of funds would only serve to further disadvantage those that I know the Commission would want to aid. . . . And elimination or reduction of such programs obviously would fall alike on all within the State and in some programs perhaps even more heavily on Negroes.").

[249] *See, e.g.*, *id.* at 2464 (statement of Rep. Poff); *id.* at 2463 (statement of Rep. Whitener).

[250] See, e.g., 110 Cong. Rec. 2488 (1964) (statement of Rep. Cormon); *id.* at 1538, 2468 (statement of Rep. Rodino); *id.* at 1520 (statement of Rep. Celler). *See also id.* at 8920 (statement of Sen. Williams); *id.* at 8345 (statement of Sen. Proxmire); *id.* at 7103 (statement of Sen. Javitts); *id.* at 7063 (statement of Sen. Pastore) ("As a general rule, cutoff of funds would not be consistent with the objective of the federal assistance statute"); *id.* at 7059, 7060 (statement of Sen. Pastore); *id.* at 7059, 7066 (statement of Sen. Ribicoff); *id.* at 6562 (statement of Sen. Kuchel); *id.* at 6544 (statement of Sen. Humphrey).

[251] Id. at 9111 (statement of Sen. Keating); *id.* at 8920 (statement of Sen. Williams); *id.* at 7103 (statement of Sen. Javitts); *id.* at 7066 (statement of Sen. Ribicoff); *id.* at 7059–63 (statements of Sens. Pastore and Ribicoff); *id.* at 6544–46, 8979–80 (statement of Sen. Humphrey). *See also Alabama NAACP State Conferences v. Wallace*, 269 F. Supp. 346, 351–52 (M.D. Ala. 1967) ("The objective of the Civil Rights Act of 1964 is to protect persons from discrimination on account of their race, color, or national origin. The philosophy of the Act is to induce as much voluntary compliance as possible. No arbitrary power is vested in any federal department of agency. The Act evinces a clear intention to limit the power of any federal department or agency to require its action to be pursuant to definite rules, regulations, or guides of general applicability. The main purpose. . . is that state and local authorities may be able to understand in advance of enforcement the rules, regulations, and enforcement policies . . . and to voluntarily conform their actions to rules of law. The purpose of the Guidelines [at issue] is to 'provide assistance and guidance to recipients to help them comply voluntarily.'"); *Title VI*, pp. 839–42.

[252] 42 U.S.C. § 2000d-1 (1988). *See* 110 Cong. Rec. 13,126 (1964) (statement of Sen. Gore) (The House version left doubt as to whether agencies were required to issue rules and regulations; however, Dirksen-Mansfield substitute replaced "may" with "shall," mandating the issuance of such standards.)

[253] *See* 110 Cong. Rec. 15,896 (1964) (statement of Rep. Celler) (Title VI "require[s] that each Federal agency which extends financial assistance . . . establish nondiscriminatory standards of general application. This means that it cannot apply one standard of conduct to one person and a different standard of conduct to another.")

Procedural limitations on enforcement measures were then included to ensure careful consideration of any agency enforcement action and to provide additional opportunity for voluntary compliance.[259] First, an agency may not take any enforcement action unless and until the agency has advised the recipient of its failure to comply and compliance cannot be achieved voluntarily. Second, agencies must seek congressional approval before terminating funds. Third, Title VI affords the recipient an opportunity to challenge the agency action in an administrative hearing and through judicial review.[260]

In sum, Congress created a compromise package that provided Federal agencies flexibility to define the discriminatory conduct prohibited by Title VI and to choose the means for effectuating recipient compliance.[261] The resulting objective of Title VI implementation is to secure prompt and full compliance voluntarily.[262] Title VI mandates fund termination only if voluntary compliance efforts fail.[263] The emphasis on voluntary compliance is intended to protect the interests of the ultimate beneficiaries by preventing the interruption of vital Federal assistance.[264] Fund termination originally was viewed as a shield against Government participation in discriminatory activities.[265] However, agencies have utilized fund termination as an affirmative tool for eliminating discrimination in federally assisted programs.[266]

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[254] 42 U.S.C. § 2000d-1 (1988).

[255] *See* 110 Cong. Rec. 2499–500 (1964) (statement of Rep. Lindsay); Exec. Order No. 12,250, 3 C.F.R. 298 (1981), *reprinted in* 42 U.S.C. § 2000d-1 (1988).

[256] *See* 110 Cong. Rec. 2499 (1964) (statement of Rep. Lindsay) ("[T]he rulemaking power is so important in this area and can be so significant because of the latitude that this title by definition has to give to the executive in drafting rules and regulations that the Chief Executive should be required to put his stamp of approval on such rules and regulations."); *see also id.* at 12,716 (statement of Sen. Humphrey); *id.* at 7067 (statement of Sen. Ribicoff); Abernathy, p. 31.

[257] *See* Abernathy, p. 29.

[258] *See* 110 Cong. Rec. 2468 (1964) (statement of Rep. Rodino).

[259] It is important to note that what constitutes voluntary compliance has not been defined by Congress; therefore, it may be inferred that the executive branch is authorized to make such determinations on a case-by-case basis. Thus, it is essential that the Department of Justice and the agencies provide standards and procedures for securing voluntary compliance.

[260] 42 U.S.C. § 2000d-1 (1988).

[261] *See* 110 Cong. Rec. 9111 (1964) (statement of Sen. Keating); *id.* at 8920 (statement of Sen. Williams); *id.* at 7103 (statement of Sen. Javitts); *id.* at 7059–63 (statements of Sens. Pastore and Ribicoff); *id.* at 6544–46, 8978–80 (statement of Sen. Humphrey). *See also* Abernathy, pp. 28–32 (discussion of the evolution of the compromise between opponents and proponents).

[262] *See* 42 U.S.C. § 2000d-1 (1988); 28 C.F.R. § 50.3(a) (1994).

[263] 42 U.S.C. § 2000d-1 (1988).

[264] *See* 28 C.F.R. § 50.3(a) (1994).

[265] Owen M. Fiss, *The Fate of an Idea Whose Time Has Come: Antidiscrimination Law in the Second Decade after* Brown v. Board of Education, 41 U. Chi. L. Rev. 742, 756 (1974).

[266] Ibid.

As Senator Humphrey explained during the hearings:

> [Title VI] encourages [F]ederal departments and agencies to be resourceful in findings ways of ending discrimination voluntarily without forcing the termination of funds needed for education, public health, social welfare, disaster relief, and other urgent programs. Cutoff of funds needed for such purpose should be the last step, not the first, in an effective program to end racial discrimination.[267]

## Judicial Development of Executive Authority and Responsibility Under Title VI

The Federal courts have played a crucial role in defining the extent of Federal agencies' authority and responsibility under Title VI. First, as intended by Congress, courts have construed Title VI to mandate that agencies promulgate rules and regulations (1) defining the discriminatory practices prohibited and (2) establishing enforcement procedures.[268] Courts have determined that the responsibility for defining what Title VI forbids and the form of compliance under Title VI is committed to the Federal agency.[269] Courts have held that an agency's determination of what constitutes discrimination is entitled to great weight,[270] and agency regulations have been upheld as presumptively valid interpretations of the requirements of Title VI.[271] Such regulations have been held by the courts to have the force and effect of law.[272]

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[267] 110 Cong. Rec. 6546 (1964). *See also id.* at 6544 (statement of Sen. Humphrey) ("Moreover, the purpose of Title VI is not to cutoff funds but to end racial discrimination. . . . In general, cutoff of funds would not be consistent with the objectives of the federal assistance statute if there are available other effective means of ending discrimination. And Sec. 602, by authorizing the agency to achieve compliance 'by any other means authorized by law' encourages agencies to find ways to end racial discrimination without refusing or terminating assistance.").

[268] *See, e.g.*, Alabama NAACP State Conference of Branches v. Wallace, 269 F. Supp. 346, 351–52 (M.D. Ala. 1967) (holding that Title VI manifests clear intent to limit the power of the Federal agencies and to require action pursuant to definite rules, regulations, or guidelines so that State and local authorities may be able to understand, in advance of enforcement, the enforcement policy and to conform voluntarily their actions to those rules, regulations, and guidelines).

[269] *See, e.g.*, Adams v. Bell, 711 F.2d 161, 165–66 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1021 (1984). However, although an agency is empowered to issue regulations that facilitate enforcement of Title VI, it may not adopt a standard for discrimination that squarely conflicts with the standard legislated by Congress or adopted by the courts. *See, e.g.*, Bryan v. Koch, 492 F. Supp. 212, 234 (S.D.N.Y), *aff'd*, 627 F.2d 612 (2d Cir. 1980). In addition, no agency action is unreviewable. Congress explicitly intended that agencies' findings be subject to judicial scrutiny. *See, e.g.*, Southern Christian Leadership Conf. v. Connolly, 331 F. Supp. 940, 945 (E.D. Mich. 1971). The standard of review to be applied is that provided for under the Administrative Procedure Act, 5 U.S.C. §§ 701–06 (1988): "arbitrary and capricious" or abuse of agency discretion (5 U.S.C. § 706(2)(A)); or, "substantial evidence," in cases in which agency action is based upon an adjudicatory or rule-making hearing (5 U.S.C. § 706(2)(E)). *See, e.g.*, NAACP v. Wilmington Medical Ctr., 453 F. Supp. 280, 303 (D. Del. 1978).

[270] *See, e.g.*, Hicks v. Weaver, 302 F. Supp. 619, 622 (E.D. La. 1969). *See also*, Udall v. Tallman, 380 U.S. 1, 16 (1965) (holding that where an administrative agency is charged with the interpretation and enforcement of a statute by Congress, its interpretations are entitled to considerable weight by the courts).

[271] *See, e.g.*, Raney v. Board of Educ. of Gould Sch. Dist., 381 F.2d 252, 255 (8th Cir. 1967), *rev'd on other grounds*, 391 U.S. 443 (1968); Blackshear Residents Org. v. Housing Auth. of Austin, 347 F. Supp. 1138, 1146 (W.D. Texas 1971); Whittenberg v. Greenville County Sch. Dist., 298 F. Supp. 784, 789 (D.S.C. 1969); Lee v. Macon County Bd. of Educ., 270 F. Supp. 859, 862 (M.D. Ala.), *aff'd sub nom.*, Wallace v. United States, 389 U.S. 215 (1967).

[272] Blackshear Residents Org., 347 F. Supp. at 1146; Macon County Bd. of Ed., 270 F. Supp. at 862; Alabama NAACP State Conference of Branches, 269 F. Supp. at 352. That force of law has been found to include: requiring recipients to sign adequate assurances of noncompliance, Gardner v. Alabama, 385 F.2d 804, 815–16 (5th Cir. 1967), *cert. denied*, 389 U.S. 1046 (1968); extending Title VI coverage to all programs operated through an assisted facility, Flanagan v. President & Directors of Georgetown College, 417 F. Supp. 377, 383–84 (D. D.C. 1976); requiring recipients to overcome affirmatively the effects of prior discrimination, Soria v. Oxnard Sch. Dist. Bd. of Trustees, 386 F. Supp. 539, 544–45 (C.D. Cal. 1974); and, requiring prompt investigation of complaints, Brown v. Weinberger, 417 F. Supp. 1215, 1220–21 (D.D.C. 1976).

Second, as further intended by Congress, courts have upheld that termination of funding is appropriate agency enforcement action for recipient noncompliance with those rules and regulations.[273] Courts have varied in their interpretations of the compliance measures available to an agency, other than termination of funds. For example, courts have held that an agency is entitled, under Title VI, to enforce contractual assurances of compliance by a recipient.[274] However, courts also have determined that before termination of funding can occur, efforts at voluntary compliance on the part of the recipient must be permitted.[275]

Some courts have interpreted agencies' Title VI enforcement authority more expansively than fund termination. For example, courts have held that Title VI requires that agencies not only refrain from providing financial support for discriminatory practices, but also make affirmative efforts to monitor and control the operations of recipients.[276]

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[273] *See, e.g.*, Board of Public Instruction v. Finch, 414 F.2d 1068, 1077–78 (5th Cir. 1969).

[274] *See, e.g.*, United States v. Marion County Sch. Dist., 625 F.2d 607, 617 (5th Cir.), *reh'g denied*, 629 F.2d 1350 (5th Cir. 1980), *cert. denied*, 451 U.S. 910 (1981) (holding that the United States is entitled to sue to enforce contractual assurances of compliance with this section's prohibition, and is entitled to whatever relief is necessary to enforce such assurances).

[275] *See, e.g.*, United States v. Baylor Univ. Medical Ctr., 736 F.2d 1039, 1050 (5th Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985).

[276] *See, e.g.*, NAACP, Western Region v. Brennan, 360 F. Supp. 1006, 1012 (D.D.C. 1973) (finding that Title VI implements fundamental prohibitions of the Fourteenth and Fifth Amendments and requires that Federal officials affirmatively police the operations of and prevent discrimination by State and local institutions funded by them). Courts have not required, however, that agencies investigate the practices of recipients prior to receiving a complaint by an aggrieved beneficiary. *See, e.g.*, Tagupa v. East-West Ctr., Inc., 642 F.2d 1127, 1129 (9th Cir. 1980) (concluding that an agency had no duty to investigate and to ensure compliance with Title VI when it was not aware of the complaint). *Cf.* Brown v. Weinberger, 417 F. Supp. 1215 at 1219 (holding that substantial delays on part of agency in concluding its investigation constituted a violation of Title VI and its regulations).

## Chapter 3

# The Coordination and Enforcement Role of the Department of Justice

## Introduction

Executive Order 12,250 gives the U.S. Department of Justice (DOJ) oversight and coordination responsibility for the Federal Title VI enforcement effort of approximately 26 executive departments or agencies.[1] Resources available for coordination and enforcement activities, such as developing model Title VI enforcement policies, procedures, and regulations, monitoring the Title VI enforcement programs of Federal agencies, and conducting liaison activities with Federal and State agencies, community groups, and the public, have been drastically reduced. In addition, despite recent efforts to improve DOJ's Title VI coordination and enforcement activities, a March 1995 reorganization within DOJ may only serve to limit Title VI oversight and coordination activities. In the opinion of DOJ staff, the inadequate activity level resulted from a lack of commitment to Title VI implementation and enforcement, which focused DOJ's priorities away from Title VI to other civil rights statutes.

## DOJ'S Interpretation of Its Authority Under Executive Order 12,250

As discussed in the previous chapters, under Executive Order 12,250,[2] the President has delegated overall leadership responsibility for coordinating the Title VI enforcement efforts of Federal agencies to the Attorney General. Because DOJ is responsible for implementing Executive Order 12,250,[3] its interpretation of its authority under the order is critical. The Commission interviewed DOJ officials and staff to determine their interpretation of DOJ's power under Executive Order 12,250.

### Enforcement Authority

In interviews with DOJ officials and staff, the Commission found almost complete agreement about the extent of DOJ's authority under Executive Order 12,250. DOJ officials and staff maintain that DOJ has no independent Title VI enforcement authority under the order. Instead, the Department's role is one of "oversight and coordination."[4] DOJ cannot initiate litigation on Title

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[1] Exec. Order No. 12,250, 3 C.F.R. 298 (1981), *reprinted in* 42 U.S.C. § 2000d-1 (1988).

[2] Exec. Order No. 12,250, 3 C.F.R. 298 (1981), *reprinted in* 42 U.S.C. § 2000d-1 (1988).

[3] *Id.*

[4] Allen Payne, Director of Program Compliance, Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, interview in Washington, D.C., Feb. 2, 1994, p. 5 (hereafter cited as Payne interview); Louis Stewart, Staff Attorney, Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, interview in Washington, D.C., Jan. 31, 1994, p. 3 (hereafter cited as Stewart interview); Bruce Purvis, Equal Opportunity Specialist (Coordinator), Agency Liaison Unit, Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, interview in Washington, D.C., Jan. 31, 1994, p. 2 (hereafter cited as Purvis interview); Flora Brown, Civil Rights Program Specialist (Coordinator), Agency Liaison Unit, Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, interview in Washington, D.C., Feb. 8, 1994, p. 3 (hereafter cited as Brown interview); Wonder Moore-Davis, Equal Opportunity Specialist (Investigator), Investigations Unit, Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, interview in Washington, D.C., Feb. 2, 1994 (hereafter cited as Moore-Davis interview.

VI cases. Rather, Federal agencies must refer Title VI cases to DOJ.[5] Furthermore, DOJ cannot impose sanctions on other Federal agencies for inadequate enforcement of the law.[6]

However, several staff members indicated that they were not certain of the limits of DOJ's authority under Executive Order 12,250. One staff member indicated that he was "unsure" whether the order gives DOJ any authority over the agencies, but if it did, it was only to require that the agencies implement their regulations.[7] Another expressed the opinion that there was "considerable confusion" about DOJ's responsibility under Executive Order 12,250. She stated that the term "leadership" in the Executive order means that "if [an agency] does not do what they are supposed to do, then it is [DOJ's] responsibility to see to it that they do."[8]

Stewart Oneglia, the former Section Chief of CORS, stated that Executive Order 12,250 gives DOJ considerable authority to ensure adequate enforcement of Title VI. She said that the order gives DOJ the authority to "tell [agencies] how to enforce Title VI." DOJ can use strong influence on the activities of the other agencies.[9] Merrily A. Friedlander, the Deputy Section Chief (Legal), said that Executive Order 12,250 gives DOJ "tons of authority" to oversee the agencies, to ensure that the agencies are enforcing Title VI, and to notify the agencies when they are not enforcing Title VI adequately.[10] Allen Payne, CORS Director of Program Compliance, agreed, adding that Executive Order 12,250 gave DOJ considerably more powers than it had previously. He said that the Executive order "reflected a maturation of the civil rights programs and civil rights enforcement in the Federal Government," and that the order created an overarching civil rights coordination program that is capable of ensuring consistency in the Federal Government's civil rights enforcement effort.[11] The former Acting Assistant Attorney General for Civil Rights characterized DOJ's role under Executive Order 12,250 as "a secondary backstop or a steel fist inside a velvet glove."[12]

Although DOJ officials and staff indicated that DOJ has no independent enforcement authority, they explained that Executive Order 12,250 gives DOJ considerable powers to ensure that Title VI is enforced consistently and aggressively. For example, agencies that disagree with a determination or recommendation by the Civil Rights

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[5] James P. Turner, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, interview in Washington, D.C., Feb. 4, 1994, p. 5 (hereafter cited as Turner interview); Bruce Purvis, Equal Opportunity Specialist (Coordinator), Agency Liaison Unit, Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, interview in Washington, D.C., Jan. 31, 1994 (hereafter cited as Purvis interview); Theodore Nickens, Deputy Section Chief (Program Compliance), Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, interview in Washington, D.C., Feb. 7, 1994, p. 4 (hereafter cited as Nickens interview).

[6] Merrily A. Friedlander, Deputy Section Chief (Legal), Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, interview in Washington, D.C., Jan. 31, 1994 (hereafter cited as Friedlander interview); Linda King, Civil Rights Program Specialist (Investigator), Investigations Unit, Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, interview in Washington, D.C., Feb. 2, 1994 (hereafter cited as King interview).

[7] *See* Joseph Talian, Civil Rights Program Specialist (Coordinator), Agency Liaison Unit, Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, interview in Washington, D.C., Feb. 1, 1994 (hereafter cited as Talian interview).

[8] Brenda Sheppard, Equal Opportunity Specialist (Investigator), Agency Liaison Unit, Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, interview in Washington, D.C., Feb. 2, 1994, p. 2 (hereafter cited as Sheppard interview).

[9] Stewart B. Oneglia, Chief, Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, interview in Washington, D.C., Feb. 1, 1994, p. 6 (hereafter cited as Oneglia interview).

[10] Friedlander interview, p. 6.

[11] Payne interview, p. 4.

[12] Turner interview, p. 5.

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Division can seek a formal opinion from DOJ's Office of Legal Counsel.[13] The former Acting Assistant Attorney General for Civil Rights said that "it is beyond contemplating" that an agency could decline to accept a DOJ determination or follow a DOJ recommendation after receiving a formal interpretation of the law from the Office of Legal Counsel.[14] The Deputy Section Chief (Legal) noted that an opinion from the Office of Legal Counsel theoretically is binding on another executive agency.[15]

DOJ officials and staff generally agree that Executive Order 12,250 does not need to be changed to ensure effective enforcement of Title VI.[16] One attorney said that irreconcilable disputes between DOJ and the agencies are so rare that it is unnecessary to revise the order to give DOJ more authority.[17] The former Acting Assistant Attorney General for Civil Rights stated that the implementation of Executive Order 12,250 is "at the mercy of the priorities of each presidential administration."[18] The former Acting Assistant Attorney General for Civil Rights summed up the consensus, saying that DOJ should first enforce the Executive order as written before determining whether any changes to the order are necessary. Explaining his position, he emphasized the need for audits and oversight.[19]

DOJ's mandate to ensure consistent and effective Title VI enforcement by the agencies provides DOJ with its own form of enforcement power. Through oversight and monitoring, DOJ can establish policies and secure compliance with and enforcement of Title VI. Active oversight of the Federal agencies is essential to Title VI compliance and enforcement.

### Pattern and Practice Authority

Currently, neither Title VI nor its implementing regulations provide the Attorney General with the authority to take direct action against a noncomplying recipient. Instead, DOJ's direct involvement is limited to cases or matters referred to the Assistant Attorney General for investigation, litigation, or other appropriate enforcement action.[20]

DOJ has indicated that "there are no changes planned or anticipated in the Attorney General's authority under Executive Order 12,250."[21] However, the Civil Rights Division confirmed that DOJ is considering a recommendation to amend Title VI to provide the Attorney General with pattern or practice authority.[22] This authority would allow DOJ to initiate litigation against recipients without a prior referral from a Federal agency. The former Acting Assistant Attorney

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[13] Ibid.

[14] Ibid., p. 5.

[15] Friedlander interview, p. 7.

[16] Turner interview, p. 6; Oneglia interview, p. 6; Friedlander interview, p. 8; Nickens interview, p. 3; Payne interview, p. 4; Sara Kaltenborn, Special Legal Counsel, Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, interview in Washington, D.C., Feb. 8, 1994, p. 3 (hereafter cited as Kaltenborn interview); Brown interview, p. 3; Sheppard interview, p. 2.

[17] Kaltenborn interview, p. 3.

[18] Turner interview, p. 6.

[19] Ibid.

[20] 28 C.F.R. § 42.412(b) (1994).

[21] *See* Loretta King, Deputy Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, letter to Frederick D. Isler, Acting Assistant Staff Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, Oct. 27, 1994, Attachment, answer no. 1, p. 1 (hereafter cited as King letter).

[22] Gerald W. Jones, Acting Deputy Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, letter to Frederick D. Isler, Deputy Assistant Staff Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, May 16, 1994, attachment, p. 5.

General for Civil Rights explained that pattern or practice authority is necessary because:

> The referral system does not really work. It represents too great an admission against interest for the agency to say "we have failed in our conciliation efforts to remove discrimination from our own program." Where the Attorney General has pattern or practice authority it has not been abused nor used to meddle unnecessarily in agency affairs.[23]

The Deputy Section Chief (Program Compliance), Theodore Nickens, added that DOJ's inability to bring its own cases hampers the Government's Title VI enforcement.[24] A CORS attorney also expressed his support for amending Title VI to give the Attorney General the authority to litigate when she determines that a recipient has engaged in a pattern or practice of discrimination.[25]

Other related civil rights statutes and nondiscrimination provisions provide the Attorney General with the authority to initiate civil actions whenever there is reasonable cause to believe that a person, group of persons, or a State or local government is engaged in a discriminatory "pattern or practice."[26] For example, Title II of the Civil Rights Act of 1964 provides:

> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a *pattern or practice* of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States . . . . [27]

Thus, the Attorney General has the discretion to file civil actions and conduct investigations without requiring an underlying individual complaint or agency action.[28]

Although "pattern or practice" is not defined by any of these statutes, the Supreme Court has held that "the words reflect only their usual meaning."[29] To define "pattern or practice," the Supreme Court relies on the legislative history of the Civil Rights Act of 1964 as follows:

> "[A] pattern or practice would be present only where the denial of rights consists of something more than an isolated, sporadic incident but is repeated, routine, or of a generalized nature. There would be a pattern or practice if, for example, a number of companies or persons in the same industry or line of business discriminated, if a chain of motels or restaurants practiced racial discrimination throughout all or a significant part of its system, or if a company repeatedly and regularly engaged in acts prohibited by the statute. The point is that single, . . . , isolated acts of discrimination

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[23] Turner interview, p. 6.

[24] Nickens interview, p. 4.

[25] Stewart interview, p. 4.

[26] *See, e.g.*, Title II of the Civil Rights Act of 1964, Pub. L. No. 88–352, § 206(a), 78 Stat. 241, 245 (codified at 42 U.S.C. § 2000a-5(a) (1988))(may file against any person or group of persons); Title VII of the Civil Rights Act of 1964, Pub. L. No. 88–352, § 707(a), 78 Stat. 241, 261 (codified at 42 U.S.C. § 2000e-6(a) (1988))(may file against any person or group of persons); The Fair Housing Act of 1968, Pub. L. No. 90–284, § 8, 82 Stat. 85 (1968)(codified as amended at 42 U.S.C. § 3614(a) (1988))(may file against any person or group of persons); Housing and Community Development Act of 1974, Pub. L. No. 93–383, title I, § 109(c), 88 Stat. 649 (codified as amended at 42 U.S.C. § 5309c (1988))(may file against any State or local government unit). In addition, some of the civil rights statutes and implementing regulations may require agencies to refer to the Attorney General any claims reasonably believed to involve a pattern or practice of discrimination. *See, e.g.*, 42 U.S.C. §§ 3610(e)(2), 3614(a) (1988); 24 C.F.R. § 103.500(b) (1994).

[27] 42 U.S.C. § 2000a-5(a) (1988) (emphasis added).

[28] *See, e.g.*, Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-5(a) (1988), Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-6(a) (1988), Fair Housing Amendments Act, 42 U.S.C. § 3614(a) (1988).

[29] International Bhd. of Teamsters v. United States, 431 U.S. 324, 336 n.16 (1977). *See also* Robert G. Schwemm, *Housing Discrimination: Law and Litigation* (Deerfield, IL: Clark Boardman Callaghan, 1992), § 26.2(2), p. 26–5.

by a single business would not justify a finding of a pattern or practice. . . ."[30]

The courts have interpreted the "pattern or practice" of discrimination as discriminatory policies or practices that affect groups or classes rather than isolated episodes affecting only individuals.[31] However, the Government may use specific instances of discrimination against particular individuals to demonstrate a defendant's general behavior pattern, but not to establish a pattern of discriminatory behavior.[32]

Although the Attorney General does not have express pattern or practice authority under Title VI for all federally assisted programs, DOJ does have pattern or practice authority under several block grant programs.[33] Although this authority is relatively new under the block grant programs, DOJ has had similar authority in other related areas, such as the Revenue Sharing Program.[34] However, to date, DOJ has not asserted its pattern or practice authority under the block grant programs.

Pattern or practice authority has enabled DOJ to conduct investigations of alleged discriminatory activities on a broad scale.[35] DOJ's exercise of this authority, under a variety of civil rights statutes, appears to fulfill Congress' intent "to provide the government with a swift and effective weapon to vindicate the broad public interest in eliminating unlawful practices at a level which may or may not address the grievances of particular individuals."[36]

## The Responsibilities and Organizational Structure of the Civil Rights Division

Within DOJ, the Attorney General has delegated her authority under Executive Order 12,250 to the Assistant Attorney General for Civil Rights, who heads the Civil Rights Division (CRD).[37] CRD was created in 1957 "to secure Federal enforcement of civil rights."[38] It is the primary entity, among six major civil rights enforcement agencies within the Federal

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[30] 431 U.S. at 336, n.16 (quoting 110 Cong. Rec. 14,270 (1964) (Senator Humphrey)).

[31] *See, e.g.*, United States v. Lansdowne Swim Club, 713 F. Supp. 785, 805 (E.D. Pa. 1989). *See also* Leland Ware, *New Weapons for an Old Battle: The Enforcement Provisions of the 1988 Amendments to the Fair Housing Act*, 7 Admin. L.J. Am. U. 59 (1993).

[32] *See, e.g.*, 713 F. Supp. at 806.

[33] *See, e.g.*, Health Services Block Grants, 42 U.S.C. § 300w-7(c) (1988); Housing and Community Development Act, 42 U.S.C. § 5309(c) (1988); Community Services Block Grant, 42 U.S.C. § 9906(c) (1988).

[34] Revenue Sharing Program, 31 U.S.C. § 6720 (1988). *See* U.S. General Accounting Office, *Federal Agencies' Block Grant Civil Rights Enforcement Efforts: A Status Report*, Rept. No. HRD 84-82 (Sept. 28, 1984). At one time, DOJ also exercised its authority to conduct services litigation. *See* U.S. Department of Justice, Civil Rights Division, "Title VI—Fifteen Years Later . . . ," *Title VI Forum*, vol. 4, no. 2 (Fall 1979), p. 9.

[35] *See* Turner interview, p. 6.

[36] United States v. Allegheny-Ludlum Indus., 517 F.2d 826, 843 (5th Cir. 1975).

[37] 28 C.F.R. § 42.412(a) (1994).

[38] Office of the Federal Register, National Archives and Records Administration, *The United States Government Manual 1994/95* (Superintendent of Documents: Washington, D.C., 1994), p. 377 (hereafter cited as *The United States Government Manual*).

Government, responsible for enforcing Federal statutes prohibiting discrimination on the basis of race, color, sex, disability, religion, and national origin.[39] With more than 400 attorneys and other staff, CRD enforces a broad range of civil and criminal statutes and Executive orders covering a wide variety of areas. The jurisdiction of the Division extends to the enforcement of civil rights in the areas of education, employment, housing, places of public accommodation, and voting.[40] In addition, CRD coordinates the enforcement activities of other Federal agencies.[41]

CRD is charged with enforcing the Civil Rights Acts of 1957,[42] 1960,[43] 1964,[44] and 1968;[45] the Voting Rights Act of 1965, as amended;[46] the Equal Credit Opportunity Act;[47] the Americans with Disabilities Act of 1990;[48] and other civil rights provisions contained in other laws and regulations. CRD also enforces several criminal civil rights statutes and the Civil Rights of Institutionalized Persons Act of 1980.[49] In addition, CRD is charged with coordinating the civil rights enforcement efforts of Federal agencies with respect to Title VI,[50] Title IX of the Education Amendments Act of 1972,[51] and section 504 of the Rehabilitation Act of 1973.[52]

CRD is on an equal level with all other DOJ divisions. The Assistant Attorney General for Civil Rights reports to the Associate Attorney General who, in turn, reports directly to the Deputy Attorney General.[53] Thus, the Assistant Attorney General for Civil Rights is only three steps away from the Attorney General, giving the position access and importance within the

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[39] U.S. Department of Justice, Civil Rights Division, *Civil Rights Division Activities and Programs*, July 23, 1992, p. 1. The six major Federal civil rights enforcement agencies include the Civil Rights Division of the Department of Justice, the Equal Employment Opportunity Commission, the Office for Civil Rights at the Department of Health and Human Services, the Office for Civil Rights at the Department of Education, the Office of Fair Housing and Equal Opportunity of the Department of Housing and Urban Development, and the Office of Federal Contract Compliance Programs of the Department of Labor. *See also The United States Government Manual*, p. 377.

[40] U.S. Department of Justice, Civil Rights Division, *Civil Rights Activities and Programs*, July 23, 1992, p. 1.

[41] Ibid.

[42] Civil Rights Act of 1957, Pub. L. No. 85–315, 71 Stat. 634 (codified as amended and superseded in scattered sections of 28 U.S.C. and 42 U.S.C.).

[43] Civil Rights Act of 1960, Pub. L. No. 86–449, 74 Stat. 86 (codified at 42 U.S.C. §§ 1974–1974e (1988)).

[44] Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

[45] Civil Rights Act of 1968, Pub. L. No. 90–284, 82 Stat. 73 (codified as amended at 42 U.S.C. §§ 3601–3619, 3631 (1988 & Supp. V 1993) and in scattered sections of U.S.C.).

[46] Voting Rights Act of 1965, Pub. L. No. 89–110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1973 to 1973gg-10 (1988 & Supp. V 1993)).

[47] Equal Credit Opportunity Act of 1974, Pub. L. No. 93–495, 88 Stat. 1521 (codified at 15 U.S.C. §§ 1691–1691f (1988 & Supp. V 1993)).

[48] Americans with Disabilities Act of 1990, Pub. L. No. 101–336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12,101–12,213 (Supp. V 1993)).

[49] Civil Rights of Institutionalized Persons Act of 1980, Pub. L. No. 96–247, 94 Stat. 349 (codified at 42 U.S.C. §§ 1997–1997j (1988)).

[50] 42 U.S.C. §§ 2000d to 2000d-7 (1988).

[51] 20 U.S.C. §§ 1681–1688 (1988).

[52] 29 U.S.C. § 794 (1988 & Supp. V 1993). *See* U.S. Department of Justice, Civil Rights Division, *Civil Rights Division Activities and Programs*, July 23, 1992, p. 2.

[53] *See The United States Government Manual*, p. 367.

Department in line with that of all other Assistant Attorneys General.[54]

CRD is comprised of an Administrative and Management Section, the Office of Redress Administration, and nine program sections—the Appellate Section, the Coordination and Review Section, the Disability Rights Section (formerly the Public Access Section), the Criminal Section, the Educational Opportunities Section, the Employment Litigation Section, the Housing and Civil Enforcement Section, the Special Litigation Section, and the Voting Section.[55] These sections compete, more or less, for adequate resources to implement their responsibilities. Of these sections, the one with primary responsibility for DOJ's coordination and oversight of the Federal nondiscrimination enforcement effort under Executive Order 12,250 is the Coordination and Review Section (CORS). In addition, CRD's various litigation sections are responsible for all Federal Title VI litigation.[56]

## The Responsibilities and Organizational Structure of the Coordination and Review Section

The Coordination and Review Section (CORS) was created in 1979 by a merger of portions of the old Federal Programs Section and the Sex Discrimination Task Force.[57] Originally established as the "Office of Coordination and Review," CORS was elevated to the status of a section in 1981 after the signing of Executive Order 12,250.[58]

### Responsibilities

At the time of its creation, CORS' (then the Office of Coordination and Review) major responsibility was "coordinating and reviewing the enforcement by Federal departments and agencies of Title VI and reviewing all Federal statutes, regulations, programs, policies, and procedures to identify sex discrimination and develop remedial proposals."[59] CORS had jurisdiction over Title VI[60] and Title IX of the Education Amendments Act of 1972.[61]

Over time, CORS' responsibilities increased, as more Federal civil rights statutes were enacted. Under Executive Order 12,250, CORS became responsible for coordinating Federal agencies' activities to ensure nondiscrimination in federally conducted programs, as required by section 504 of the Rehabilitation Act of 1973.[62] It also became responsible for civil rights provisions of other Federal statutes.[63]

With the enactment of the Americans with Disabilities Act of 1990,[64] CORS became the focal point of DOJ's legislative and regulatory development and technical assistance activities with respect to the act.[65] Some of these responsibilities were given to the newly created Public Access Section in 1992. However, CORS lost some of its staff to this new section.[66] CORS also retained significant responsibilities with respect to the Americans with Disabilities Act of 1990, including administrative enforcement, investigation, and clearinghouse and coordination responsibilities for Title II of the act.[67] Thus, until March 1995, CORS was responsible for the duties established in Executive Order 12,250 and coordinated the Federal Government's investigation of complaints under Title II of the Americans with Disabilities Act of 1990.[68]

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[54] Ibid.

[55] U.S. Department of Justice, Civil Rights Division, *Civil Rights Division Activities and Programs*, July 23, 1992, p. 2; U.S. Department of Justice, Civil Rights Division, organizational chart, July 23, 1992.

[56] U.S. Department of Justice, Civil Rights Division, *Civil Rights Division Activities and Programs*, July 23, 1992, p. 2.

[57] *See* U.S. Department of Justice, Civil Rights Division, "Days Reorganizes Civil Rights Division," *Title VI Forum*, vol. 4, no. 1 (Spring-Summer 1979), pp. 1, 4.

[58] U.S. Commission on Civil Rights, *Survey of the Department of Justice Oversight and Coordination Responsibility for Consistent and Effective Implementation of Title VI of the Civil Rights Act of 1964*, response completed by the U.S. Department of Justice, Q. 33, p. 14 (hereafter cited as DOJ Survey).

[59] *See* U.S. Department of Justice, Civil Rights Division, "Days Reorganizes Civil Rights Division," *Title VI Forum*, vol. 4, no. 1 (Spring-Summer 1979), p. 4.

[60] 42 U.S.C. §§ 2000d to 2000d-7 (1988).

[61] 20 U.S.C. §§ 1681–1688 (1988).

[62] 29 U.S.C. § 794 (1988 & Supp. V 1993).

[63] Exec. Order No. 12,250, § 1–201, 3 C.F.R. 298 (1981) *reprinted in* 42 U.S.C. § 2000d-1 (1988).

[64] 42 U.S.C. §§ 12,101–12,213 (Supp. V 1993).

On March 1, 1995, DOJ reorganized CRD. According to the Assistant Attorney General for Civil Rights, he proposed the reorganization to "refocus" CORS on its Executive Order 12,250 responsibilities.[69] Under the reorganization, the Disability Rights Section, formerly the Public Access Section, was expanded to include responsibility for all disability-related coordination and enforcement activities, including section 504 of the Rehabilitation Act and the Americans with Disabilities Act.[70] The Assistant Attorney General for Civil Rights transferred staff from CORS to accommodate the Disability Rights Section's increased responsibilities.[71] Thus, as of March 1, 1995, CORS' responsibilities are limited to enforcing Title VI and Title IX of the Education Amendments Act of 1972.

CORS also is authorized to assist other agencies in the development of regulations and guidelines for civil rights enforcement; aid other agencies' compliance with their nondiscrimination responsibilities; resolve conflicts among agencies; encourage cooperation in enforcement among the other agencies; evaluate regularly the civil rights laws and regulations to improve enforcement; establish guidelines for recordkeeping, reporting, and exchanging information; create a program of cooperation between Federal agencies and State and local agencies; and train agency employees in effective civil rights enforcement.[72]

CORS does not litigate Title VI cases referred to DOJ by the Federal agencies. Title VI litigation is the responsibility of the other CRD sections, according to the subject matter areas for which they are responsible.[73] For example, a Title VI case involving housing issues is litigated by CRD's Housing and Civil Enforcement Section, whereas a Title VI case alleging discrimination by an educational institution is litigated by CRD's Educational Opportunities Section.[74] The decision to structure CRD sections according to broad subject areas was made by former Assistant Attorney General for Civil Rights Drew S. Days III in 1979.[75] According to an article in DOJ's *Title VI*

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[65] DOJ Survey, Q. 34, p. 14.

[66] Ibid.

[67] 42 U.S.C. §§ 12,131–12,165 (Supp. V 1993).

[68] Deval L. Patrick, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, letter to Mary Frances Berry, Chairperson, U.S. Commission on Civil Rights, Apr. 28, 1995, p. 2 (hereafter cited as Patrick letter).

[69] *See* Patrick letter, p. 2.

[70] Ibid.

[71] Ibid.

[72] U.S. Department of Justice, Civil Rights Division, *Civil Rights Division Activities and Programs*, July 23, 1992, pp. 5–6.

[73] *See* U.S. Department of Justice, Civil Rights Division, "Days Reorganizes Civil Rights Division," *Title VI Forum*, vol. 4, no. 1 (Spring/Summer 1979).

[74] *See* ibid.

[75] Ibid.

*Forum*,[76] "the process of forging new subject matter alignments and eliminating some administrative subdivisions [had the benefit of] the assignment of fewer attorneys to administrative responsibilities, [and] more flexibility in the use of resources since litigators [are] not restricted to narrow specialties. . . "[77] As a result, DOJ does not have litigating attorneys who specialize in Title VI.

## Structure

CORS is headed by a Section Chief, who reports to a Deputy Assistant Attorney General for Civil Rights, who, in addition to CORS, oversees CRD's Special Litigation Section and its Voting Section.[78] CORS is divided internally into a legal staff and a program compliance staff, each headed by a Deputy Section Chief. Until the reorganization of CORS on March 1, 1995, the program compliance staff was further divided into two units, the Agency Liaison Unit and the Investigations Unit, each with its own supervisor. The two program compliance units were coordinated by the Director of Compliance, who reported to the Deputy Section Chief for Program Compliance, who in turn reported to the Section Chief.[79] Thus, before the reorganization, CORS had five layers of review. To streamline the management structure of CORS, CRD eliminated three management positions—Director of Compliance, Supervisor of the Agency Liaison Unit, and Supervisor of the Investigations Unit.[80] The streamlining of CORS management is appropriate in light of the corresponding reduction in CORS staff. However, if CORS receives the necessary staff increases to address its Executive Order 12,250 responsibilities, then CORS staff may again require first-line supervision. Also, it is vital that CORS retain its position as a CRD section with a senior executive-level Section Chief, in line with all other CRD Section Chiefs, to ensure that Title VI and other Executive Order 12,250 responsibilities are given the priority that they deserve within CRD.

## Roles of Attorneys, Coordinators, and Investigators

CORS is staffed with attorneys, coordinators, and investigators. The Commission relied on staff interviews and a review of selected CORS position descriptions to compare the actual responsibilities of each position with their intended roles.

The primary Title VI responsibility of CORS attorneys is to review proposed regulations or changes in regulations originating in other Government departments and agencies that operate programs covered by Title VI.[81] In addition, CORS attorneys answer questions and supply technical assistance to DOJ or other Federal agencies. CORS attorneys do not litigate cases or review findings of discrimination brought to DOJ by other departments.[82] Those findings go directly to the relevant litigation sections within CRD.[83] Over the past 5 years, the attorneys' Title VI workload has been minimal; most staff time has been taken up with the Americans with Disabilities Act, Title IX of the Education Amendments of 1972, and section 504 of the Rehabilitation Act of 1973.[84] CORS attorneys have spent some time assisting in the development of an Executive order on environmental protection concerns arising under the purview of Title VI.[85] In 1994, CORS assigned one attorney to develop model Title VI regulations for promulgation to the Federal agencies.[86] However, this assignment was suspended because of the National Performance Review's study of all Federal agency regulations.[87]

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[76] The *Title VI Forum*, later the *Civil Rights Forum*, was a DOJ newsletter published several times a year. It provided information on the enforcement of Title VI and other civil rights statutes. *See* pp. 122–23 below for a more extensive discussion of the *Forum*.

[77] Ibid., p. 4.

[78] U.S. Department of Justice, Civil Rights Division, organizational chart, July 23, 1992.

[79] U.S. Department of Justice, Civil Rights Division, Coordination and Review Section, organizational chart, DOJ Survey, attachment D.

[80] Patrick letter, p. 3.

[81] *See* Friedlander interview, pp. 8, 10.

[82] Ibid., pp. 9–10.

[83] Ibid.

Each of the CORS coordinators has responsibility for providing oversight to six or seven Federal agencies with programs covered by Title VI. The coordinators serve as liaisons between DOJ and their assigned agencies.[88] They also offer technical assistance to the agencies and, in some cases, transmit legal advice. The latter function can duplicate work done by CORS attorneys.[89] The CORS coordinators review Civil Rights Implementation Plans[90] developed by other Federal departments and agencies, but they currently do not perform onsite audits to analyze how well the agencies implement their plans.[91]

Before CORS' March 1, 1995 reorganization, CORS coordinators were required to devote a portion of their time to referring complaints filed under the Americans with Disabilities Act of 1990 to designated agencies.[92] In addition, coordinators were required to ensure that the designated agencies properly processed the complaints after referral.[93] One staff member stated that coordinators spent a considerable amount of time on complaint referral, a task she thought should have been delegated to an intake staff.[94] As with the attorneys, coordinators reported that in recent years they have paid Title VI little attention compared to the Americans with Disabilities Act of 1990 and section 504 of the Rehabilitation Act of 1973.[95] Prior to CORS' reorganization, the Director of Program Compliance estimated, CORS coordinators spent roughly 20 percent of their time on the Americans with Disabilities Act.[96] However, coordinators' Americans with Disabilities Act functions, along with 10 CORS staff members, were transferred to the Disability Rights Section on March 1, 1995.[97]

Before the March 1, 1995, reorganization of CORS, none of the CORS investigators conducted Title VI investigations. Their primary duties were investigating complaints filed under Title II of the Americans with Disabilities Act, including complaints filed against prisons and law enforcement agencies by disabled prisoners.[98] According to CORS' Director of Program Compliance, CORS investigators spent 99.9 percent of their time on issues related to the Americans with Disabilities Act.[99]

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[84] Ibid., p. 12.

[85] Stewart interview, p. 3.

[86] Friedlander interview, p. 4.

[87] Patrick letter, p. 4.

[88] Purvis interview, p. 2.

[89] Tahan interview, p. 2.

[90] Each agency is required to submit annual Civil Rights Implementation Plans to DOJ for review and approval showing how it intends to implement its responsibilities under Executive Order 12,250. See pp. 89–101 below for a discussion of the Civil Rights Implementation Plans.

[91] Williams interview, p. 3.

[92] Ibid., p. 2.

[93] Ibid., p. 4.

[94] King interview, p. 3.

[95] *See* Brown interview, p. 2.

[96] Payne interview, p. 4.

[97] Patrick letter, p. 2.

In general, the duties performed by CORS staff bear little resemblance to their official position descriptions. The position descriptions for CORS' senior attorneys give them several responsibilities that they do not perform, including:

- advising on and assisting with litigation being handled by DOJ's Civil Division;[100]

- establishing and maintaining cooperative working relationships with constituent groups, both within and outside Federal Government;[101]

- developing solutions for problem areas and negotiating Federal agency acceptance of these solutions.[102]

A sample position description for coordinators reveals how light their Title VI workload is, in comparison to their intended functions. In addition to reviewing agencies' Civil Rights Implementation Plans, coordinators are supposed to recommend the plans for approval or disapproval.[103] Although most coordinators acknowledge that there are "good" and "bad" implementation plans, they almost never "disapprove" an agency's Civil Rights Implementation Plan.[104] Furthermore, in addition to reviewing and approving agencies' Civil Rights Implementation Plans, the position description indicates that coordinators should be conducting "comprehensive indepth evaluative interagency surveys of agency civil rights programs" and monitoring agency implementation of recommendations made based on the interagency surveys.[105] However, coordinators have not conducted interagency surveys since the early 1980s.[106]

Coordinators' liaison activities should include providing training, as well as technical assistance, to the agencies.[107] Although several coordinators indicated that they provide technical assistance to Federal agencies, no coordinator has conducted any training sessions for Federal agency staff.[108]

The position description gives coordinators a role in policy development and review that few coordinators have been asked to fulfill. According to the position descriptions, the coordinators should "participate in analyses of government-wide civil rights issues . . . for the purpose of setting standards or developing procedures which effect all Federal grant agencies."[109] Furthermore, they should review and recommend approval or disapproval of agencies' regulations as well as their nonregulatory directives, such as guidelines, manuals, and handbooks.[110] Yet, there is no indication that coordinators have engaged in any form of policy development or that they review regularly agencies' regulations and nonregulatory directives.

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[98] *See* Waters interview, p. 2; King interview, p. 2; Sheppard interview, p. 2; and Moore-Davis interview, p. 3.

[99] Payne interview, p. 4.

[100] U.S. Department of Justice, Civil Rights Division, Coordination and Review Section, Position Description, Supervisory Attorney Advisor.

[101] Ibid.

[102] U.S. Department of Justice, Civil Rights Division, Coordination and Review Section, Position Description, Attorney Advisor.

[103] U.S. Department of Justice, Civil Rights Division, Coordination and Review Section, Position Description, Civil Rights Program Specialist, Duty no. 8.

[104] Brown interview, p. 5, Allen Payne, Director of Program Compliance, Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, telephone interview, June 21, 1994 (hereafter cited as Payne telephone interview).

[105] U.S. Department of Justice, Civil Rights Division, Coordination and Review Section, Position Description, Civil Rights Program Specialist, Duties no. 3 and 4.

[106] Talian interview, p. 2.

[107] U.S. Department of Justice, Civil Rights Division, Coordination and Review Section, Position Description, Civil Rights Program Specialist, Duty no. 6.

[108] *See* Talian interview, p. 2; Purvis interview, p. 2; Brown interview, p. 2.

It is not feasible for the coordinators to handle the workload described in the sample position description, given that each coordinator is assigned to six or seven Federal agencies. This is particularly true for the two coordinators who are responsible for decentralized agencies, such as the Department of Agriculture and the Department of Transportation, which have multiple civil rights offices.[111]

A sample position description for investigators indicates that they should be assigned to investigate complaints of discrimination under Title VI.[112] However, none of the investigators were involved in Title VI activities prior to CORS' reorganization.[113]

## Budget, Staffing, and Workload of the Coordination and Review Section

Over the years, CORS' budget, staffing, and workload have reflected changing civil rights priorities within DOJ. Resources devoted to Title VI enforcement have diminished as other civil rights statutes have become priority concerns of the Department and as CORS' overall resources have declined.

### Civil Rights Division Budget Process

In February 1994, James P. Turner, the former Acting Assistant Attorney General for Civil Rights, described CRD's budget process as "irrational and complicated."[114] He said that the process forces CRD to rank its activities, even though all of its programs are equally important. The former Acting Assistant Attorney General for Civil Rights equated ranking CRD's programs with ranking your children: "You can't love one more than the other." He reported that of approximately 12 CRD programs, Title VI was ranked towards the bottom in previous budgets.

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[109] U.S. Department of Justice, Civil Rights Division, Coordination and Review Section, Position Description, Civil Rights Program Specialist, Duty no. 5.

[110] Ibid., Duties no. 7 and 10.

[111] U.S. Department of Justice, Civil Rights Division, Coordination and Review Section, Agency Liaison Unit, "Coordinator/Agency Assignments List" (undated), DOJ document submission, Nov. 9, 1993 (USCCR files). Under the March 1, 1995, reorganization, CORS has established ten overlapping teams of coordinators, investigators, and attorneys to work on various projects. Patrick letter, pp. 3–4. According to the Assistant Attorney General for Civil Rights, this new structure "has streamlined operations significantly and has proved highly effective during the two months since its implementation." Ibid. Under the new structure, CORS' program unit consists of 10 staff members each with collateral coordination and investigative duties. Theodore Nickens, Deputy Chief (Program), Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, telephone interview, May 2, 1995. The staff who were investigators under the previous organization are assigned primarily investigative duties, while former coordinators focus primarily on coordination priorities. Ibid.

[112] U.S. Department of Justice, Civil Rights Division, Coordination and Review Section, Position Description, Equal Opportunity Specialist, introduction.

[113] Although the investigators will no longer investigate complaints filed under the Americans with Disabilities Act, they will be assigned to investigate Title VI complaints and conduct Title VI compliance reviews under a Memorandum of Understanding with the Office of Justice Programs to be signed later in 1995. *See* Nickens telephone interview. While it is important for CORS investigators to focus on Title VI rather than on the Americans with Disabilities Act, it is unclear whether CORS will be able to provide proper oversight and monitoring for its own Title VI enforcement activities in DOJ programs without creating a conflict of interest.

[114] Turner interview, p. 7.

However, he indicated that Title VI was ranked fifth or sixth in the 1995 budget.[115]

According to the former Acting Assistant Attorney General for Civil Rights, CRD's budget process begins with guidance from the administration regarding its program priorities. CRD staff then consult with the various sections within CRD to estimate how many staff and resources they will need 18 months later to achieve the level of operations expected by the administration. He described this process as "problematic" because CRD is forced to rank its programs 18 months in advance of the actual budget year.[116]

The sections submit their projected activities and estimated budget calculations.[117] For example, CORS will make an "informed guess" as to how many additional staff and resources it will need in 1995 to enhance its Title VI activity level.[118] CRD then balances and ranks the budget requests of the different sections. CRD sends its proposal to DOJ's budget staff, who have to balance all of DOJ's programs and determine the Department's priorities. DOJ finalizes its entire budget proposal and forwards it to the Office of Management and Budget.[119]

The Office of Management and Budget then decides which agencies will have their budgets cut or augmented. Once the Office of Management and Budget completes its calculations, and the President approves it, the entire Federal budget is forwarded to Congress.[120] Following final congressional action on the DOJ budget, the Office of Management and Budget divides DOJ's entire budget into two accounts: Legal Affairs and Justice Programs.[121] The Legal Affairs account includes all of the litigation divisions except for the Antitrust Division, and the Justice Programs account includes the Bureau of Prisons, the U.S. Marshal Service, and the Federal Bureau of Investigations, among others.[122]

The Attorney General has the discretion to decide how much money each section will receive from the approved budget for CRD. The former Acting Assistant Attorney General for Civil Rights explained that the Attorney General also has some discretion to redistribute the budget funds throughout DOJ with a 5 or 10 percent variation from Congress' approved figures. For example, in 1993 the Attorney General redistributed $1 million to the Housing and Civil Enforcement Section to "emphasize" the litigation of fair housing cases. He also indicated that each division has some discretion to redistribute the approved funding among sections.[123]

To understand the impact of the budget process on CORS, two issues should be addressed. First, in the budget process, DOJ/CRD must rank its civil rights programs. The administration in power will designate the civil rights areas that are to be "priority." Thus, if Title VI is not designated as a priority civil rights area, then the section responsible for its oversight will not receive priority funding or other adequate resources, such as additional staff, to implement the statute. Second, a section may have responsibility for implementing more than one civil rights area. Thus, a section may compete within itself to implement multiple mandates. As a result, depending on the designated priorities, one area may receive more funds and staff at the expense of another. The budget and staff resources for Title VI enforcement have suffered.

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[115] Ibid., p. 2.

[116] Ibid., p. 7. *See also* Jones interview, p. 2.

[117] Jones interview, p. 2.

[118] Turner interview, p. 7.

[119] Ibid., p. 7; Jones interview, p. 2.

[120] Turner interview, p. 7.

[121] Ibid.

[122] Ibid.

[123] Ibid., p. 8.

## Budget and Staff Resources

CRD was the only major civil rights enforcement office where funding increased significantly during the 1980s.[124] As table 3.1 indicates, funding for CRD doubled in constant dollars between fiscal year 1979 and fiscal year 1993.[125] During this period (1980–1993), the number of full-time permanent positions (FTPs) in CRD increased from 374 to 469.[126]

However, CORS did not share in the overall growth of CRD during these years. When the Office of Coordination of Review was created in 1979, it had 31 staff.[127] The number of staff rose to 46 FTPs in 1981,[128] the year that Executive Order 12,250 became effective. Thereafter, the number of staff in CORS began to decline steadily, reaching a low of 30 in 1993.[129] Although CORS' budget has increased in constant dollars since 1980, the budget has not been adjusted to keep pace with the increasing salaries of CORS' increasingly senior staff.[130] Furthermore, CORS' 1994 appropriation earmark was $20,000 lower than in 1993.[131]

President Carter signed Executive Order 12,250 on November 2, 1980. At that time, it was expected that the staffing of CORS would rise significantly. In a January 28, 1981, memorandum, Acting Deputy Assistant Attorney General for Civil Rights Lynn Walker stated:

> Prior to issuance of Executive Order 12,250, OMB worked closely with the Civil Rights Division to develop an acceptable staffing enhancement package to provide for its increased responsibilities. During this period, CRD submitted, and OMB painstakingly reviewed, a number of staffing proposals. Ultimately, OMB approved a package which provided Coordination and Review with a ceiling of 57 [full-time permanent (FTP)] positions [in FY 1981].[132]

The 57 positions requested by the Carter administration represented an increase of 25 positions, or 78 percent, over the fiscal year 1980 ceiling of 32. However, in the next year, plans to increase CORS' staffing were reduced considerably.[133] Ms. Walker continued:

> However, due to Division-wide budgetary and staffing constraints, it was subsequently decided that the [Coordination and Review] Section should be permitted to hire only 14 of the 25 personnel authorized. This decision was made to allow minimum fulfillment of extant obligations, [while] affording flexibility to the new administration to reassess the priority attached to

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[124] Chambers Associates, Inc., "An Analysis of Budgetary and Staff Resources made Available for Civil Rights Enforcement Activities During the Carter, Reagan, and Bush Administrations," prepared for the U.S. Commission on Civil Rights, June 1994, table 1, p. 6 (unpublished).

[125] Ibid. *See also* table 3.1.

[126] U.S. Department of Justice, Civil Rights Division, Coordination and Review Section, Response to U.S. Commission on Civil Rights Title VI Questions, Nov. 9, 1993, Q. 3, p. 1 (hereafter cited as DOJ, November Response to Title VI Questions). *See* table 3.1.

[127] DOJ Survey, Q. 33, pp. 13–14.

[128] *See* table 3.1.

[129] *See* ibid.

[130] U.S. Department of Justice, Civil Rights Division, Decision Unit Overview, Salaries and Expenses, General Legal Activities: 15-0128-0-1-752, Coordination and Review Unit—1916 (no date).

[131] *See* King letter, attachment, answer no. 3, p. 1.

[132] Lynn Walker, Acting Deputy Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, memorandum to James P. Turner, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, "Coordination and Review Section," Jan. 28, 1981, p. 6.

[133] *See* ibid.

TABLE 3.1.
Budget and Staffing of CRD and CORS, 1980-1995*

| | **1980** | **1981** | **1982** | **1983** | **1984** | **1985** | **1986** | **1987** |
|---|---|---|---|---|---|---|---|---|
| *Budget* ($ in 1000s) | | | | | | | | |
| CRD | 15,145 | 16,665 | 17,603 | 19,227 | 20,700 | 22,624 | 22,333 | 23,601 |
| CORS | 979 | 1,171 | 1,775 | 1,850 | 1,927 | 2,069 | 2,194 | 2,315 |
| Public Access Sec. | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A |
| *Budget* (1000s of constant $) | | | | | | | | |
| CRD | 21,034 | 21,175 | 20,956 | 21,923 | 22,648 | 23,815 | 22,929 | 23,601 |
| CORS | 1,360 | 1,488 | 2,089 | 2,109 | 2,108 | 2,178 | 2,253 | 2,315 |
| Public Access Sec. | NA | NA | NA | NA | NA | NA | NA | NA |
| *Staffing* (FTPs on board) | | | | | | | | |
| CRD | 374 | 388 | 377 | 380 | 379 | 392 | 402 | 388 |
| CORS | 37 | 46 | 41 | 44 | 42 | 41 | 42 | 36 |
| Public Access Sec. | NA | NA | NA | NA | NA | NA | NA | NA |

| | **1988** | **1989** | **1990** | **1991** | **1992** | **1993** | **1994** | **1995** |
|---|---|---|---|---|---|---|---|---|
| *Budget* ($ in 1000s) | | | | | | | | |
| CRD | 26,321 | 27,756 | 32,688 | 44,216 | 47,581 | 52,700 | 59,956 | 62,602 |
| CORS | 2,528 | 2,528 | 2,776 | 7,166 | 7,933 | 3,241 | 3,221 | 3,307 |
| Public Access Sec. | NA | NA | NA | NA | NA | 8,029 | 8,679 | 8,698 |
| *Budget* (1000s of constant $) | | | | | | | | |
| CRD | 25,406 | 25,748 | 29,108 | 36,816 | 38,527 | 41,398 | 46,334 | NA |
| CORS | 2,440 | 2,345 | 2,472 | 6,162 | 6,605 | 2,624 | 2,489 | NA |
| Public Access Sec. | NA | NA | NA | NA | NA | 8,029 | 6.707 | NA |
| *Staffing* (FTPs on board) | | | | | | | | |
| CRD | 378 | 374 | 385 | 418 | 455 | 469 | 518 | 537 |
| CORS | 36 | 37 | 34 | 35 | 31 | 30 | 32 | 23 |
| Public Access Sec. | NA | NA | NA | NA | 26 | 34 | 39 | 72 |

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Source: Department of Justice, Civil Rights Division, Coordination and Review Section, answers to U.S. Commission on Civil Rights Title VI Questions, Nov. 9, 1993, attachments. Note: The budget figures reflect appropriations. The Commission requested budget and staffing information for fiscal years prior to 1980; however, DOJ indicated that those figures were unavailable. In 1992, although CORS was appropriated $7.9 million, it obligated only $3.1 million. The same year, the Public Access Section did not receive an appropriation, but obligated $5.2 million. The 1994 budget figures do not reflect the creation of the Disability Rights Section and the transfer of budget from CORS to that section. To calculate the constant-dollar figures, the nominal dollar amounts were adjusted using a price index for government services developed by the U.S. Department of Commerce, Bureau of Economic Analysis, as reported in President of the United States, *Economic Report of the President* (Superintendent of Documents: Washington, DC, 1995), table B-3, p. 279. The base year for the price index is 1987.

*The Commission requested budget and staffing information for fiscal years prior to 1980; however, DOJ indicated that those figures were unavailable.

Note: For fiscal year 1996, the Civil Rights Division requested $65.304 million. Patrick testimony, p. 1.

**TABLE 3.2.**
**CORS Staffing by Function, 1981-1993***

| | 1981 | 1984 | 1989 | 1990 | 1991 | 1992 | 1993 |
|---|---|---|---|---|---|---|---|
| Executive Order 12,250 | 46 | 42 | 27 | 20 | 15 | 12 | 11 |
| Title VI | 15 | 9 | 9 | 6 | 5 | 4 | 4 |
| Americans with Disabilities Act | NA | NA | 10 | 14 | 20 | 19 | 19 |
| Total | 46 | 42 | 37 | 34 | 35 | 31 | 30 |

Source: DOJ document submission, Nov. 9, 1993, response to question 4 (USCCR files).
*The Commission requested staffing information for fiscal years prior to 1980; however, DOJ indicated that those figures were unavailable. Additionally, information prior to 1981 is not applicable because Executive Order 12,250 was not signed until 1980.

this Section's mission and to allocate resources accordingly.[134]

In the mid-1980s, CORS concentrated on "implementing the federally conducted program requirements of Section 504 of the Rehabilitation Act of 1973 through assistance to nearly 100 agencies in the development of regulations and the completion of self-evaluations."[135] In the late 1980s, CORS began to take on responsibilities related to the passage of the Americans with Disabilities Act.[136] In fiscal year 1989, Assistant Attorney General for Civil Rights John Dunne reclassified five CORS coordinators as investigators to fulfill CORS' new responsibilities under the Americans with Disabilities Act. This action left CORS with only four staff members to coordinate CORS' responsibilities under Executive Order 12,250.[137] In 1991, CORS received an infusion of resources to help it cope with its responsibilities under that act. The next year, however, the CRD's Public Access Section was created, and CORS' budget and staffing decreased.[138]

The changing priorities within CORS are reflected in table 3.2, which demonstrates the staffing levels for each of CORS' major functions. Over time, CORS devoted less staff time to Executive Order 12,250 activities, including Title VI activities, and devoted more time to activities relating to the Americans with Disabilities Act. Even after the Public Access Section was created, the Americans with Disabilities Act has continued to take up significantly more than half of CORS' available resources. As a result, staff time devoted to Title VI has fallen dramatically, from 15 FTPs in 1981, to only 4 in 1993.[139]

DOJ has never studied the impact of CORS' former responsibilities under the Americans with Disabilities Act on the section's ability to implement its responsibilities under Executive Order 12,250. However, CORS officials estimate that, with the addition of its responsibilities under the Americans with Disabilities Act, CORS' workload doubled without an increase in resources. As a result, staff available for Executive Order 12,250 activities was cut in half.[140] The Americans with Disabilities Act has been the top priority for all CORS staff from 1988 until March 1995, when functions related to the Americans with Disabilities Act were removed from CORS.[141] The former Acting Assistant Attorney General for Civil Rights agreed that the Americans with Disabilities Act has "overshadowed" Title VI at CORS.[142]

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[134] Ibid.

[135] DOJ Survey, Q. 36, p. 18; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988 & Supp. V 1993).

[136] 42 U.S.C. §§ 12,101–12,213 (Supp. V 1993). *See* DOJ Survey, Q. 36, p. 15.

[137] Oneglia interview, p. 3. Ms. Williams indicated that in 1992 the number of coordinators had been reduced from seven to four. Williams interview, p. 2.

[138] *See* tables 3.1 and 3.2.

[139] *See* table 3.2.

He indicated that CORS had a clear need for additional resources. He added that CRD never has enough staff to conduct its program activities, but that, in his opinion, Title VI has suffered proportionally more than any other CRD program.[143]

CRD's March 1995 reorganization, which removed all responsibility for the Americans with Disabilities Act from CORS, was intended to allow CORS to concentrate on its responsibilities under Executive Order 12,250, including Title VI.[144] However, in the reorganization, the Assistant Attorney General for Civil Rights transferred 10 staff members from CORS to other sections in the division, reducing the size of CORS by almost one-third.[145] Under the reorganization, CORS consists of 21 professional and support staff members, including 3 attorneys, 2 senior-level equal opportunity specialists, 2 civil rights program specialists, and 5 equal opportunity specialists.[146] Thus, although the reorganization was intended to improve CORS' ability to focus its attention on its nondisability-related Executive Order 12,250 responsibilities, the reduction in staff may serve to limit further CORS' effectiveness. This staff reduction is particularly critical in light of the steady decline in Title VI activity for more than 15 years. The Assistant Attorney General for Civil Rights acknowledged that CORS needs additional resources and stated that he intends to increase CORS' resources "in the future." However, he neither explained how CORS will be able to accomplish its responsibilities with diminished staff and resources nor specified when and how he intends to reallocate resources to CORS.[147]

## Management Plans

Effective management of an office's staff, resources, and workload requires a comprehensive management plan that is updated quarterly or annually, depending on the critical nature of emerging civil rights priorities, issues, activities, or changes in civil rights statutes.[148] According to the former Acting Assistant Attorney General for Civil Rights, CRD has always operated under a "management plan."[149] However, the style and content of the management plans have varied from administration to administration.[150] Gerald W. Jones, the Acting Deputy Assistant Attorney

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[140] Oneglia interview, p. 3.

[141] Ibid., p. 8.

[142] Turner interview, p. 3.

[143] Ibid., p. 8.

[144] Patrick letter, p. 2.

[145] Ibid.

[146] *See* Ibid., attachment A.

[147] Patrick letter, p. 2.

[148] *See* William K. Fallon, ed., *AMA Management Handbook* (New York: American Management Associations, 1983), pp. 1–7 to 1–8. *See also* Peter F. Drucker, *Management: Tasks, Responsibilities, Practices* (New York: Harper & Row, Publishers, 1974), pp. 121–29; Richard I. Lyles, *Practical Management Problem Solving and Decision Making* (New York: Van Nostrand Reinhold Company, 1982), pp. 124–49.

[149] Turner interview, p. 8.

[150] Ibid.

General for Civil Rights, stated that he has never seen a formalized management plan for CRD. However, he explained that CRD is in the process of preparing a formal management plan.[151] None of the staff in CORS interviewed by the Commission had participated in preparing a management plan or knew of the existence of such a plan.[152] The former Section Chief of CORS indicated that her participation in CRD's policy development process was limited to assisting in the development of briefing books for the incoming Assistant Attorney General for Civil Rights and annual participation in the DOJ budget process.[153]

## Development of Standard Title VI Policies and Procedures

One of the major responsibilities of the Attorney General, through CORS, is to ensure consistent Title VI policy among Federal agencies and to develop common standards for Title VI enforcement procedures.[154] Executive Order 12,250 gives the Attorney General a "leadership" role "for the consistent and effective implementation" of Title VI and other Federal civil rights statutes.[155] This role includes developing and reviewing agencies' regulations, guidelines, and policies. Furthermore, Executive Order 12,250 directs the Attorney General to establish, through guidelines and regulations, standards and procedures in the following specific areas: enforcement actions, investigations, compliance reviews, recordkeeping and reporting requirements, and employee training.[156] To a large degree CORS has abandoned this role in recent years.

### DOJ's Title VI Regulations, Guidelines, Policies, and Procedures

In the early years of Title VI, DOJ was effective in providing guidance on Title VI's policies and procedures. In 1966, DOJ issued guidelines for the enforcement of Title VI.[157] These guidelines address alternative courses of action available to Federal agencies when they determine that a recipient is in noncompliance with Title VI.[158]

In the early 1970s, DOJ also issued guidelines to assist in its oversight of Federal agencies' Title VI enforcement programs. CORS published "Guidelines on Conducting Interagency Surveys,"[159] which outline comprehensively how to conduct interagency surveys, a review process that proved to be one of DOJ's most effective oversight tools.[160] The publication provides guidance to DOJ staff on how to ascertain effectively the strengths and weaknesses of an agency's enforcement program. For example, the guidelines describe how to initiate contact with the agency, make arrangements for reviews, conduct thorough reviews, pinpoint and assess the appropriate personnel, contact public interest groups that monitor agency enforcement programs, and determine the necessity of visiting regional offices.[161] Despite the benefits of these guidelines, CORS staff do not use them because a DOJ policy decision ended review of Federal agencies through the use of interagency surveys.[162]

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[151] Jones interview, p. 2.

[152] *See* Williams interview, p. 2; King interview, p. 3; Talian interview, pp. 6–7.

[153] Oneglia interview, p. 2.

[154] Exec. Order No. 12,250, §§ 1–202 to 1–207, 3 C.F.R. 298 (1981), *reprinted in* 42 U.S.C. § 2000d-1 (1988).

[155] *Id.*

[156] *Id.* §§ 1–203 to 1–207.

[157] 28 C.F.R. § 50.3 (1994).

[158] *Id.* § 50.3(a). *See* pp. 73–76 below for further discussion of these guidelines.

[159] U.S. Department of Justice, "Guidelines for Conducting Interagency Surveys," (undated) (hereafter cited as DOJ Guidelines for Conducting Interagency Surveys).

[160] *See* pp. 101–05 below for a more extensive discussion of Interagency Surveys.

[161] DOJ Guidelines for Conducting Interagency Surveys.

DOJ also provides Federal agencies with guidance on Title VI policies and procedures through another publication, "Procedures for the Development of Guidelines by Federal Agencies for Recipients of Federal Financial Assistance."[163] This document does not contain DOJ's guidelines on Title VI policies and procedures, but provides suggestions for Federal agencies in developing their own Title VI guidelines, as DOJ regulations require of them.[164] Agencies must include in their guidelines the nature of the Title VI coverage; methods of enforcement; examples of prohibited discriminatory practices; required or suggested remedial actions; and requirements pertaining to covered employment, data collection, complaints, and public information.[165] DOJ's procedures offer examples of agencies' guidelines and sample format. They also explain how an agency can determine when guidelines are appropriate for specific programs.[166] In 1979, DOJ published "Checklist for Analysis of a Federal Agency's Title VI Enforcement Effort."[167] The publication reiterated that Federal agencies must develop their own guidelines "as a program specific supplement to [their] Title VI regulations, for each Title VI covered program."[168] It also specified that agencies should distribute the guidelines to recipients, beneficiaries, compliance officers, and the general public.[169]

In addition to guidelines on Title VI policies and procedures, DOJ issued regulations that defined in greater detail the Federal agencies' obligations to enforce Title VI. In December 1976, approximately 11 years after the civil rights statute became effective, DOJ issued regulations entitled "Coordination of Enforcement of Nondiscrimination in Federally Assisted Programs."[170] The coordination regulations lay out the responsibilities of Federal agencies regarding the enforcement of Title VI in the following areas:

- agency regulations
- agency guidelines
- public dissemination of Title VI information
- data and information collection
- procedures for determining compliance, including preaward and postaward reviews
- complaint procedures
- coverage of employment practices under Title VI
- requirements of State agencies administering continuing State programs
- methods of resolving noncompliance
- interagency cooperation and delegations
- agency staff
- agency Title VI enforcement plans.[171]

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[162] Oneglia interview, p. 2.

[163] U.S. Department of Justice, "Procedures for the Development of Guidelines by Federal Agencies for Recipients of Federal Financial Assistance," (undated), DOJ document submission, Nov. 9, 1994 (USCCR files) (hereafter cited as DOJ Procedures for the Development of Guidelines).

[164] 28 C.F.R. § 42.404(a) (1994). DOJ's regulations, "require federal agencies to develop and publish 'Title VI guidelines for each type of program to which they extend financial assistance.'" DOJ Procedures for the Development of Guidelines, p. 1. For a further analysis, see the discussion on DOJ's coordination regulations, pp. 73–76.

[165] 28 C.F.R. § 42.404(a) (1994).

[166] DOJ Procedures for the Development of Guidelines, pp. 2–4.

[167] U.S. Department of Justice, Civil Rights Division, "Checklist for Analysis of a Federal Agency's Title VI Enforcement Effort," Title VI Forum, vol. 4, no. 2 (Fall 1979), p. 12, nos. 26–28.

[168] Ibid.

[169] Ibid.

[170] 28 C.F.R. Part 42, Subpart F (1994).

[171] *Id.*

The coordination regulations were issued first under Executive Order 11,764,[172] which preceded Executive Order 12,250. These coordination regulations were revised in 1981 to reflect the new Executive Order 12,250, but they have not been revised since that date. In January 1982, DOJ circulated a draft of revised coordination regulations to the Federal agencies.[173] The revised coordination regulations were to be:

> updated to reflect the fact that Title VI is now only one of many nondiscrimination statutes for which the Attorney General has coordination authority, and amended where administrative experience has indicated that changes would be appropriate. It specifies the relationship between the Department of Justice and agencies empowered to provide Federal financial assistance and establishes procedural standards for the effective enforcement of civil rights statutes that are to be reflected in each agency's regulations.[174]

However, the revised coordination regulations never were published. In early 1983, DOJ announced that it would not issue revised coordination regulations, because "extensive change of existing regulations was not required."[175] At the time, Vice President George Bush announced that "[a] full evaluation of all the information brought to bear on this subject prompted the conclusion that extensive change of the existing . . . regulations was not required, and that with respect to those few areas where clarification might be desirable, the courts are currently providing useful guidance and can continue to do so in the future."[176] According to the former Section Chief of CORS, the draft coordination regulations never were finalized because of differences between CORS and CRD on content.

Since issuing these guidelines and regulations, DOJ, for the most part, has abandoned its responsibility for Title VI policy development and for establishment of Title VI procedures. In the late 1970s, DOJ began to develop a "Title VI Manual," to be published in two volumes.[177] The first volume was to contain indepth information on Title VI, including its legislative history, analyses of major legal issues, digests of important litigation, and examples of prohibited discrimination. It was to list, by Federal agency, the programs covered by Title VI, as well as the agency's regulations, civil rights office, general counsel's office, Federal financial assistance budget, and Title VI enforcement budget.[178] The second volume was to be a detailed procedures manual paralleling the coordination regulations in structure, but going into more detail.[179] In 1977, DOJ stated that it hoped to complete the manual by the end of the year.[180] However, the Title VI manual never was issued.

In 1995, CRD indicates that CORS once again has begun developing a two-volume Title VI manual similar to the 1977 proposal.[181] The first volume will set forth legal history and precedents, and the second volume will be a practical manual for investigating Title VI issues, including hypothetical situations and application of the law to particular fact patterns.[182]

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[172] Exec. Order No. 11,764, 3 C.F.R. 849 (1971–1975), *revoked by*, Exec. Order No. 12,250, 3 C.F.R. 298 (1981), *reprinted in* 42 U.S.C. § 2000d-1 (1988).

[173] U.S. Department of Justice, Civil Rights Division, "Federally Assisted Regulation," *Civil Rights Forum*, vol. 6, no. 3 (Summer 1983), p. 5.

[174] U.S. Department of Justice, Civil Rights Division, "Justice Department Revises Its Coordination Regulation," *Civil Rights Forum*, vol. 6, no. 1 (Fall 1982), p. 3.

[175] U.S. Department of Justice, Civil Rights Division, "DOJ Will Not Issue Coordination Reg." *Civil Rights Forum*, vol. 6, no. 2 (Winter/Spring 1983), p. 9.

[176] Vice President George Bush, as quoted in U.S. Department of Justice, Civil Rights Division, "Federally Assisted Regulation," *Civil Rights Forum*, vol. 6, no. 3 (Summer 1983), p. 3.

[177] U.S. Department of Justice, Civil Rights Division, "DOJ Drafting Title VI Manual," *Civil Rights Forum*, vol. 2, no. 2 (Summer 1977), p. 4.

[178] Ibid.

[179] Ibid.

[180] Ibid.

Similarly, in the 1980s, attempts were made to issue an updated model Title VI regulation for promulgation to the Federal agencies. However, as with the efforts to finalize the revised coordination regulations, the attempts were abandoned because of disagreements between CORS and CRD on their content.[183]

At the beginning of the current administration, CORS resumed revising the model agency regulations.[184] According to DOJ, the proposed model regulation would serve as a "state-of-the-art guide for agencies drafting new regulations and for changes to existing regulations."[185] It would be consistent with DOJ's coordination regulation and would follow existing Title VI regulations. "Where appropriate, it would adopt provisions from regulations implementing Title IX of the Education Amendments of 1972. . . .[It] also would implement the definition of 'program or activity' added to Title VI by the Civil Rights Restoration Act."[186] The former Section Chief of CORS indicated that CORS wanted every agency to change its Title VI regulations to reflect updated case law and legislation after CORS has issued its model regulation.[187]

However, in 1995, CORS suspended its work on the model regulations. According to the Assistant Attorney General for Civil Rights, development of the model regulations has been tabled because of the National Performance Review's assessment of all agency regulations.[188] However, he did not indicate whether the National Performance Review evaluation will consider the necessary revisions to the Title VI regulations that CORS has identified.

CORS develops policy statements upon request from the Assistant Attorney General for Civil Rights, but does not issue routinely policy interpretations as court decisions and other circumstances require. Policymaking and dissemination is one of the areas that two CORS senior-level staff members expressed a desire to strengthen.[189]

As part of its coordination function, DOJ is required to receive and review agencies' regulations, policy interpretations, guidelines, and manuals.[190] According to the Deputy Section Chief (Legal), however, the agencies have ceased sending these documents to DOJ for review.

DOJ still has not developed coordinated Federal Title VI policies and procedures. DOJ has neither updated its coordination regulations, produced a revised model regulation for the agencies, nor issued guidelines or manuals to help agencies understand and fulfill their responsibilities under Title VI. As a result of DOJ's nonproductivity in the area of Title VI, DOJ's current policies and procedures are outdated. Under the current administrations, efforts to produce a Title VI manual have begun, but, pending the National Performance review, CRD does not plan to issue a model

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[181] Patrick letter, p. 4.

[182] Ibid.

[183] King letter, answer no. 4, p. 3. *See also* Oneglia interview p. 3; Friedlander interview, p. 4; Kaltenborn interview, p. 2.

[184] Ibid.

[185] King letter, attachment, answer no. 4, p. 4.

[186] Ibid.

[187] Oneglia interview, p. 3.

[188] Patrick letter, p. 4.

[189] Oneglia interview, p. 4; Friedlander interview, pp. 3–4, 9.

[190] *See* Exec. Order No. 12,250, § 1–202, 3 C.F.R. 298 (1981), *reprinted in* 42 U.S.C. § 2000d-1 (1988).

Title VI regulation, and it also does not plan to update its coordination regulations.

## DOJ's Policy Positions

According to the former Section Chief of CORS, Title VI policy is set by CRD, not CORS.[191] A review of some critical Title VI policy areas confirms DOJ's general policy inaction in the past.

### Civil Rights Restoration Act

After the enactment of the Civil Rights Restoration Act of 1987,[192] DOJ recognized that the Federal agencies' regulations needed to be updated to reflect the new law.[193] In October 1988, DOJ sent a letter to each Federal agency with existing Title VI regulations suggesting changed regulatory language. In particular, the letter suggested changes to the definitions of "program or activity," "program," and "recipient."[194] However, this letter and the need to amend the agency regulations did not receive a high priority at CORS or at the agencies. To date, none of the Federal agencies has altered their regulations to reflect the clarifications in Title VI provided by the Civil Rights Restoration Act.[195] In its response to the Commission's survey, DOJ indicated that the term "program or activity" is defined "very broadly" under the Civil Rights Restoration Act.[196] DOJ has indicated that its proposed model Title VI regulation "implements the definition of 'program or activity' added to Title VI by the Civil Rights Restoration Act. . . ."[197]

In 1995, in its newly revived *Civil Rights Forum* newsletter, DOJ indicated that the meaning of "program or activity" under Title VI includes "all of the operations of [the institution] — any part of which is extended Federal financial assistance."[198] In the newsletter, DOJ urges all agencies to review their compliance programs to ensure that they apply Title VI's amended definition consistently to all programs.[199] DOJ stated that the original agency regulations that existed prior to the *Grove City* decision reflect the Civil Rights Restoration Act's restored definition of program or activity.[200] However, the Title VI regulations do not contain the specific definition of "program or activity" as it applies to Title VI coverage. Furthermore, the Federal agencies' regulations do not include provisions explaining the scope of their termination authority as it is applied in practice.

### Employment Discrimination

DOJ's coordination regulations specify that Federal agencies have jurisdiction over employment discrimination under Title VI both when 1) the purpose of a Federal assistance program is the provision of employment and when 2) employment discrimination causes discrimination against beneficiaries of the federally assisted program, regardless of the program's purpose.[201] As indicated above, this broad interpretation of Federal agencies' jurisdiction under Title VI was a matter of some controversy during previous administrations. However, the basic policy never has been altered.

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[191] Oneglia interview, p. 2.

[192] Pub. L. No. 100–259, 102 Stat. 28 (codified as amended at 20 U.S.C. §§ 1681note, 1687, 1687note, 1688, 1688note (1988); 29 U.S.C. §§ 706, 794 (1988 & Supp. V 1993); 42 U.S.C. §§ 2000d-4a, 6107 (1988)).

[193] U.S. Department of Justice, Civil Rights Division, Coordination and Review Section, *Report on Executive Order 12,250, October 1, 1987—September 30, 1988*, p. 14.

[194] U.S. Department of Justice, Civil Rights Division, Coordination and Review Section, *Report on Executive Order 12,250, October 1, 1989—September 30, 1992*, p. 37.

[195] *See* chapters on individual agencies.

[196] DOJ Survey, Q. 8, p. 5.

[197] King letter, attachment, answer no. 4, p. 4.

[198] U.S. Department of Justice, Civil Rights Division, "Restoration Act Clarifies Meaning of 'Program or Activity,'" *Civil Rights Forum* (vol. 9, no. 1 (Spring 1995), p. 3.

[199] Ibid.

[200] *See* ibid.

In 1983, DOJ issued "Procedures for Complaints of Employment Discrimination Filed Against Recipients of Federal Financial Assistance."[202] These procedures require Federal agencies to refer complaints of employment discrimination against recipients of Federal financial assistance to the Equal Employment Opportunity Commission, except when the complaints also allege other forms of discrimination by the recipient and when the complaints involve a pattern or practice of discrimination. The agencies are required to handle, on their own, complaints that involve allegations of both employment discrimination and discrimination in other practices of the recipient.[203] When considering whether a recipient has engaged in unlawful discrimination in employment, agencies are required to consider Title VII case law and the Equal Employment Opportunity Commission guidelines,[204] unless inapplicable.[205]

### Application of Title VI to Block Grant Programs

The need for updated DOJ guidelines and policy guidance on the application of Title VI to block grant programs becomes more apparent with consideration of recent and proposed changes in Federal financial assistance statutes. Starting in the early 1980s, Federal agencies increasingly have provided funding to the States through block grants, rather than through categorical grants or revenue sharing.[206] This growing reliance on block grant funding arises from the federalism principle supporting the reduction of the Federal Government through decreased Federal spending and expanded State responsibility for domestic programs.[207]

Block grants combine the characteristics of categorical and revenue sharing grants. Although block grants are not created for specific purposes like categorical grants, they are designed for general categories of domestic programs.[208] In addition, although block grant funding has some restrictions, unlike revenue sharing, it is noncompetitive. The U.S. Advisory Commission on Intergovernmental Relations defines block grants as follows:

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[201] 28 C.F.R. § 42.402(f) (1994).

[202] *Id.* § 42.605.

[203] *Id.*

[204] 29 C.F.R. Parts 1604–1607 (1994).

[205] 28 C.F.R. § 42.604 (1994).

[206] Categorical grants are competitive funding programs designated for specific purposes. *See* Eugene Boyd, Analyst, and Sandra Osbourn, Specialist, Government Division, Congressional Research Service, The Library of Congress, *Block Grants: An Overview*, Rept. No. 95–264 GOV, p. 1 (Feb. 10, 1995) (hereafter cited as CRS, *Block Grants*). Revenue sharing involves automatic distribution of funds, few restrictions on the use of the funds, and no matching requirements. Sandra S. Osbourn, Specialist in American National Government, Government Division, Congressional Research Service, The Library of Congress, *Federalism in the United States: Toward the Third Century an Overview* of Trends and Issues, Rept. No. 89–262 GOV (Apr. 17, 1989), p. 3 (hereafter cited as CRS, *Federalism*). In 1981 Congress passed the Omnibus Budget Reconciliation Act of 1981 which created nine block grant programs under the administration of the Departments of Health and Human Services, Education, and Housing and Urban Development. Pub. L. No. 97–35, 95 Stat. 357 (codified as amended in scattered sections of U.S.C.).

[207] *See* CRS, *Federalism*, p. 6. *See also* Arkansas, Louisiana, New Mexico, Oklahoma, and Texas Advisory Committees, report for submission to the U.S. Commission on Civil Rights, *The New Wave of Federalism: Block Granting and Civil Rights in the Southwest Region*, January 1983, p. 3 (hereafter cited as *The New Wave of Federalism*).

[208] CRS, *Block Grants*, p. 1.

1. Federal aid is authorized for a wide range of activities within a broadly defined functional area.
2. Recipients have substantial discretion in identifying problems and designing programs and allocating resources to deal with them.
3. Administrative, fiscal reporting, planning, and other federally imposed requirements are kept to the minimum amount necessary to ensure that national goals are being accomplished
4. Federal aid is distributed on the basis of a statutory formula, which results in narrowing Federal administrators' discretion and providing a sense of fiscal certainty to recipients.
5. Eligibility provisions are statutorily specified and favor general purpose governmental units as recipients and elected officials, and administrative generalists as decision makers.[209]

The increased use of block grants has led to significant changes. Competition among States for Federal monies has decreased, if not disappeared. States no longer confront matching requirements for most block grants, and they have broad discretion in the use of the block grant funds.[210] However, greater State discretion limits the Federal agencies' ability to conduct preaward reviews of applicants, an important method for overseeing compliance with Title VI, because the Federal Government does not control the distribution of Federal funds. As a result, greater obstacles exist to Federal Title VI enforcement of block grant programs. Although the States are in the best position to monitor the distribution of block grant funding, few consistent mechanisms exist to ensure that States sufficiently oversee compliance with Title VI.

In January 1982, DOJ's Office of Legal Counsel addressed the issue of whether block grant programs are subject to Title VI. In a memorandum to the Director of the Office of Management and Budget, DOJ concluded that "the nondiscrimination provisions of Title VI, Title IX, Section 504, and the Age Discrimination Act" apply to block grant programs.[211]

However, DOJ never has issued guidance to the Federal agencies on how specifically they can enforce Title VI for block grant programs. In the Fall of 1982, DOJ indicated in its *Civil Rights Forum* that it would work with the Federal agencies "to develop regulations that are consistent with both the block grant approach and civil rights requirements."[212] There is no indication that DOJ ever did this, and no Federal agencies have revised their Title VI regulations to reflect the civil rights concerns under the block grant programs.[213]

Five of the Commission's State Advisory Committees commented in a 1983 report that "the relationship between the Federal Government and the States [in civil rights enforcement of block grant programs] still remains undefined at present."[214] In particular, States appeared uninterested in assuming responsibility for civil rights enforcement.[215] To provide assistance to State and local officials, community organizations, and

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[209] Ibid., p. 5 (citing U.S. Advisory Commission on Intergovernmental Relations, *Block Grants: A Comparative Analysis* (Report A-60) Washington, D.C., 1977. Each State receiving block grants enacted under the Omnibus Budget Reconciliation Act of 1981 is required to report on its programs. The Reconciliation Act requires States to report on the proposed use of block grant funds including: goals and objectives; activities to be supported, areas to be served, and "categories or characteristics" of the individuals to be served; and the criteria and method for fund distribution. Omnibus Budget Reconciliation Act, Pub. L. No. 97-35, § 1742, 95 Stat. 357 (codified as amended in scattered sections of U.S.C.).

[210] *The New Wave of Federalism*, p. 4.

[211] U.S. Department of Justice, Office of Legal Counsel, Memorandum Opinion for the Counsel to the Director, Office of Management and Budget, Jan. 18, 1982 (no page number).

[212] U.S. Department of Justice, Civil Rights Division, "Civil Rights Responsibilities Under Block Grants," *Civil Rights Forum* (vol. 6, no. 1), Fall 1982, p. 5.

[213] *See* chapters on the individual Federal agencies.

[214] *The New Wave of Federalism*, p. 16.

[215] Ibid., pp. 11-16.

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private citizens in evaluating procedures used to implement block programs, the five Southwestern State Advisory Committees adopted a minimum standards checklist.[216] The "Civil Rights Compliance/Enforcement" section of that checklist includes Federal requirements that all block grants be implemented in a nondiscriminatory manner and that States sign assurances of nondiscrimination before receiving funding. The checklist also recommends the following State activities:

- enactment of nondiscrimination and affirmative action statutes and executive orders
- clear articulation of a nondiscriminatory policy in implementing block grants
- development of State nondiscrimination enforcement mechanisms that include a separate enforcement entity, adequate funding and staff, sanctions, a data collection and reporting system, independence, and direct reporting to the Governor
- clear identification of an individual's right to complain of discrimination and the procedures required
- development and identification of clear procedures for investigating and remedying complaints
- development and clear articulation of sanctions to be employed
- development of procedures/criteria for State compliance reviews.[217]

Although the checklist provides some guidance to States on their Title VI enforcement roles in block grant programs, Federal agencies and States could benefit from Federal guidelines clearly defining their roles.

DOJ has provided little policy guidance on Title VI enforcement in block grant programs. According to DOJ:

> Recently, the Federal Government has adopted a "block grant" approach whereby the Government gives the State a general grant that it can disburse within the State to furnish certain related types of services. This approach shifts much control from the Federal Government to the States.[218]

In 1984 the Comptroller General of the General Accounting Office submitted a report to Congress, *Federal Agencies' Block Grant Civil Rights Enforcement Efforts: A Status Report*.[219] That report noted that, although the Omnibus Budget Reconciliation Act of 1981 provided some civil rights provisions specific to block grants, it generally did not change Federal agencies' responsibilities in enforcing civil rights laws. The report revealed that, other than limited requirements imposed by the act, neither the Department of Health and Human Services nor the Department of Education responded to the increased responsibility and broader discretion of State recipients by changing either the Federal agency's Title VI enforcement role or the Title VI obligations of the States. The Department of Housing and Urban Development adjusted some aspects of its enforcement approach by shifting the focus of its technical assistance and monitoring activities from subrecipients to the larger State recipient.[220] Although the Department of Housing and Urban Development placed some requirements on States to ensure enforcement of Title VI in block grant programs, the other agencies have not done so. In this case, DOJ policy guidance or regulations could have provided Federal agencies the initiative to make State recipients more responsible for

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[216] Ibid., p. 31.

[217] Ibid., p. 33.

[218] U.S. Department of Justice, Civil Rights Division, "Civil Rights Responsibilities Under Block Grants," *Civil Rights Forum*, vol. 6, no. 1 (Fall 1982), p. 5.

[219] General Accounting Office, *Federal Agencies' Block Grant Civil Rights Enforcement Efforts: A Status Report*, September 28, 1984 (hereafter cited as GAO, *Federal Agencies' Block Grant Civil Rights Enforcement Efforts*).

[220] Ibid., pp. i–iv.

Title VI enforcement, rather than leaving Title VI enforcement to the discretion of the State agencies.

According to the former Acting Assistant Attorney General for Civil Rights, the trend towards block grants has presented difficulties for Title VI enforcement.[221] In response to a Commission inquiry on the effect of block grant programs on Title VI enforcement, DOJ indicated that it could not adequately address the effects of block grant programs without conducting a detailed study of the issue. As of May 1994, DOJ had not forwarded the issue of updating agencies' civil rights enforcement efforts with respect to block grant programs to Assistant Attorney General for Civil Rights Deval Patrick.[222]

In 1995 Congress is considering the enactment of the Personal Responsibility Act of 1995.[223] The act would convert the current individual entitlement programs, such as some welfare programs, into block grant programs. Consequently, Title VI would apply to a block grant welfare program, although it currently does not apply to welfare entitlement programs in which beneficiaries receive direct assistance payments from the Federal Government. As demonstrated by Federal agencies' response to the Omnibus Reconciliation Act, they could benefit from DOJ guidance on the proper enforcement of Title VI in block grant programs, especially if Congress creates more block grant programs in the future.

To date, DOJ has not provided any guidance on Title VI issues relating to block grant programs or the distinction between direct and indirect assistance programs. Although CRD recognizes the need to provide guidance on the application of Title VI to block grant programs, to date, CORS has no specific plans other than to explore the issue after discussions with the Federal funding agencies.[224]

DOJ must provide clarification on the distinction between benefits stemming from direct assistance, also known as individual entitlements, to which Title VI does not apply, and benefits stemming from indirect assistance programs, such as block grant programs, to which Title VI does apply. This clarification would apprise Federal agencies, recipients, and beneficiaries of when implementation and enforcement of Title VI is necessary.

## Federal Agency Civil Rights Staffing, Organizational Structure, and Training

DOJ's coordination regulations specify merely that "[s]ufficient personnel be assigned by a Federal agency to its Title VI compliance program to ensure effective enforcement of Title VI."[225] However, DOJ does not provide formal guidance on the number and qualifications of Title VI enforcement staff needed for effective enforcement. For instance, DOJ does not require that this staff be full-time, fully trained civil rights compliance officers. DOJ also does not provide adequate guidance as to the organization and location of this staff within Federal agencies. As the designated Federal coordinator of Title VI enforcement, DOJ has an obligation to ensure that civil rights offices are structured sufficiently to provide effective civil rights enforcement.

In 1979, DOJ published a "Checklist for Analysis of a Federal Agency's Title VI Enforcement Effort" in its newsletter, the *Title VI Forum*.[226] The checklist provided some indication on what DOJ regards as important staffing considerations. The checklist indicates that an agency should have "sufficient" civil rights staff at the national, regional, and local levels.[227] The checklist also indicates that civil rights personnel should receive training on the agency's program operations and program operations personnel should receive civil rights training, and that compliance staff should receive regular skill development and specialty training.[228] The checklist does not, however, amount to formal policy guidance to the Federal agencies.

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[221] Turner interview, p. 4.

[222] Gerald W. Jones, Acting Deputy Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, letter to Frederick Isler, Deputy Assistant Staff Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, May 16, 1994, Responses to CRS Follow-up Questions, no. 10, p. 6.

[223] H.R. 4, 104th Cong., 1st Sess., § 601 (1995).

[224] Patrick letter, p. 5.

[225] 28 C.F.R. § 42.414 (1994).

[226] U.S. Department of Justice, Civil Rights Division, "Checklist for Analysis of a Federal Agency's Title VI Enforcement Effort," *Title VI Forum*, vol. 4, no. 2 (Fall 1979), p. 11 (hereafter cited as DOJ Title VI Checklist).

The Department also has conveyed its views in letters to individual agencies. For example, in a 1994 letter to the Director of Civil Rights at the U.S. Department of Transportation, former Acting Assistant Attorney General for Civil Rights James P. Turner indicated that agencies should not delegate internal and external civil rights responsibilities to the same person, and program officers should not be given external civil rights compliance responsibilities as collateral duty.[229] Mr. Turner wrote:

> When "internal" civil rights enforcement and "external" civil rights enforcement are combined organizationally, EEO priorities and activities tend to overwhelm external enforcement. This is especially true when civil rights enforcement is highly decentralized. For example, internal and external enforcement divisions may successfully coexist in a departmental civil rights office or in the civil rights office of a modal agency. It is quite a different story, however, when a district or regional office civil rights specialist in an agency of a department is assigned both EEO and external civil rights duties.
>
> Regardless of organizational location, civil rights specialists should be assigned full-time to external enforcement, especially in agencies with major and varied civil rights programs and responsibilities. It is less desirable to assign individual civil rights specialists both EEO and external enforcement duties. It is generally not desirable to assign civil rights responsibilities to program staff as "collateral duties."[230]

Moreover, DOJ does not provide adequate guidance concerning how Federal agencies should organize their civil rights compliance staff. The checklist indicated that in agencies with several civil rights offices there should be a central civil rights office with authority over the other offices. It also indicated that in agencies where civil rights staff were in field offices, the central civil rights office should have authority over these staff.[231] In his letter to the Director of Civil Rights at the Department of Transportation, Mr. Turner indicated that "civil rights staff should report to civil rights, not program office, supervisors." He also explained that "a strong department-level civil rights office is needed even if operational civil rights enforcement functions are assigned to the modal administrations [of the Department of Transportation]."[232]

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[227] Ibid., no. 10, p. 11.

[228] Ibid., no. 19, no. 20, and no. 21.

[229] James P. Turner, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, letter to Antonio J. Califa, Director, Departmental Office of Civil Rights, Office of the Secretary, U.S. Department of Transportation, Feb. 2, 1994, p. 2 (hereafter cited as Turner letter).

[230] Ibid.

[231] DOJ Title VI Checklist, no. 4 and no. 5, p. 11.

[232] Turner letter, p. 2.

DOJ's position on Federal agency civil rights staffing and organization has been issued only on an informal basis, such as in the checklist, or on an agency-by-agency basis, such as in the former Acting Assistant Attorney General for Civil Rights' letter to the Department of Transportation. However, DOJ has not disseminated its position on civil rights office structure to the Federal agencies in formal guidelines or directives.

## Standards for Procedures

By and large, DOJ's standards for procedures are contained in its coordination regulations[233] and its Title VI guidelines.[234] These have not been updated in more than a decade. Hence, they do not always reflect current practices and issues. Furthermore, they often are too general to provide much guidance to Federal agencies. The need for a manual, such as the Title VI manual that DOJ was preparing in the late 1970s, is evident. The Commission survey of Federal agencies asked whether the agencies felt the need for DOJ to prepare and issue a Title VI compliance manual. The large majority of agencies responded in the affirmative.[235]

### Preaward Reviews

DOJ's coordination regulations require agencies to conduct "application reviews" of applicants for Federal assistance before approving the assistance.[236] The regulations are very vague as to what these application reviews should entail. They require that the agencies receive an assurance of compliance from applicants and review data submitted by the applicant.[237] The regulations also allow the agencies to "take other steps necessary" for determining compliance. However, they do not detail what steps the agencies may take to determine compliance beyond simply communicating with local governments and community organizations.[238] They do not address differences among cursory reviews involving mere acceptance of the assurance of noncompliance, desk-audit reviews, and onsite reviews. They do not provide guidance concerning the types of data that the agencies must review to reach a finding of compliance. Furthermore, as noted above, DOJ has never revised the regulations to reflect the growing trend towards providing Federal financial assistance in the form of State block grants.[239]

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[233] 28 C.F.R. Subpart F, "Coordination of Enforcement of Non-discrimination in Federally Assisted Programs" (1994).

[234] 28 C.F.R. § 50.3 (1994). *See also* DOJ Procedures for the Development of Guidelines.

[235] *See* U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Agriculture, Office of Civil Rights Enforcement, Q. 18, p. 14; U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Agriculture, Soil Conservation Service, Q. 18, p. 14; U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Agriculture, Food and Nutrition Service, Q. 18, p. 14; U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Agriculture, Farmers Home Administration, Q. 18, p. 14; DOE Survey, Q. 18, p. 13; U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the Environmental Protection Agency, Q. 18, p. 16; U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Health and Human Services Q. 18, p. 15; U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of the Interior, Q. 18, p. 14; U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Labor, Q. 18, p. 14; U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Transportation, National Highway Traffic Safety Administration, Q. 18, p. 16; U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Transportation, Federal Transit Authority survey, Q. 18, p. 16; U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Transportation, Federal Railroad Administration, Q. 18, p. 15.

*See* HUD Survey, Q. 18, p. 10; U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the Small Business Administration, Q. 18, p. 11. The Department of Housing and Urban Development and the Small Business Administration were the only two agencies that answered in the negative.

[236] 28 C.F.R. § 42.407(b) (1994).

### Postaward Reviews

DOJ's coordination regulations require Federal agencies to implement "effective program[s] of postapproval compliance reviews."[240] These reviews are to include "periodic submission of compliance reports by recipients" and may involve field reviews of some recipients.[241] The regulations also require that any findings from these reviews be written and that notice be given to the Assistant Attorney General for Civil Rights if they result in findings of noncompliance.[242] The regulations do not give sufficient detail on the differences between desk-audit and onsite reviews. For example, they do not explain how an agency should choose to do one type of review versus another. They do not specify what types of information each review should include. DOJ does not require the reviews to be conducted by the civil rights office; in fact, the regulations encourage the agencies to include a Title VI component in their general program reviews.[243] Although encouraging program offices to conduct Title VI postaward reviews may ensure that more programs are reviewed, this process will only be effective if program staff receive sufficient training in Title VI.

The former Section Chief of CORS emphasized the importance of conducting compliance reviews. She noted that agencies' Title VI enforcement programs cannot rely on complaints alone, because it often is difficult for affected communities to recognize violations of Title VI. For instance, she said that it is unlikely that individuals in a minority community adversely affected by the placement of a highway built with Federal funds would know that they could file a Title VI complaint. Agency compliance reviews are essential for reaching these types of violations.[244]

### Complaint Investigations

DOJ's coordination regulations require Federal agencies to publish procedures for handling complaints. The agencies should investigate all complaints with apparent merit and provide written notice to the complainant and the applicant or recipient of the disposition of the complaint. Agencies can allow recipients to investigate complaints against them, but they must ensure that the recipients have adequate complaint processing procedures and receive reports on complaint investigations from the recipients. Agencies and recipients must maintain a log of all complaints filed against them.[245] The regulations give no specific guidance, however, on the steps that must be taken in investigating complaints or on the time-frames for prompt complaint processing.

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[237] *Id.* § 42.407(b).

[238] *Id.*

[239] The coordination regulations have not been revised since Oct. 27, 1981. 28 C.F.R. § 42.401 (1994). Thus, the regulations do not reflect changes in funding mechanisms resulting from the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97–35, 95 Stat. 357 (codified as amended in scattered sections of U.S.C.).

[240] 28 C.F.R. § 42.407(c)(1) (1994).

[241] *Id.*

[242] *Id.* § 42.407(c)(2),(d).

[243] *Id.* § 42.407(c)(1).

[244] Oneglia interview, p. 6.

According to the former Section Chief of CORS, CRD always has opposed incorporating time-frame requirements for complaint investigations into the agencies' regulations because it might expose the agencies to potential liability if they fail to meet required timeframes. However, she maintains that CORS should seek alternative ways to reduce delays in the completion of Title VI complaint investigations.[246]

### Sanctions

DOJ's coordination regulations direct agencies to initiate "appropriate enforcement procedures" against recipients who have been found in non-compliance and who do not enter into compliance voluntarily.[247] DOJ gives specific guidance in its "Guidelines for the Enforcement of Title VI, Civil Rights Act of 1964."[248] These guidelines specify courses of action a Federal agency can take when it cannot achieve voluntary compliance. They require agencies, before taking the ultimate sanction of terminating Federal financial assistance, to consider taking available alternative actions such as: 1) seeking court enforcement; 2) seeking the assistance of other Federal agencies or State and local government agencies with authority to enforce nondiscrimination requirements; and 3) bypassing recalcitrant State recipients by awarding assistance to local governments or directly to the beneficiaries.[249] They also specify that a Federal agency can defer financial assistance temporarily. The guidelines outline procedures to be followed for new applications, requests for continuation or renewal of assistance, and short-term programs, as well as sub-grantees.[250]

Merrily Friedlander, the CORS Deputy Chief and head of the legal unit, explained that the threat of fund termination often compels recipients to comply voluntarily. As a result, the termination sanction is used rarely.[251] Nevertheless, both she and another CORS attorney stated that fund termination is not an effective method for enforcing Title VI, and preferred litigation to fund termination. However, Ms. Friedlander noted that some agencies, such as the Department of Education, have not referred cases to DOJ for litigation, because DOJ accepted so few cases.[252]

The former Section Chief of CORS believes that the Federal agencies have interpreted their options for sanctioning recipients under Title VI too narrowly, to mean that they can either terminate funds or refer cases to DOJ for litigation. Many agencies do not use the other available alternatives. As a result, she recommended that DOJ provide guidance to the agencies on alternative procedures for resolving complaints.[253]

DOJ is neither providing active leadership to convey to the agencies the variety of alternative resolution mechanisms at their disposal nor encouraging the agencies to be aggressive in using those methods.

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[245] 28 C.F.R. § 42.408 (1994).

[246] Oneglia interview, p. 6.

[247] 28 C.F.R. § 42.411(a) (1994).

[248] 28 C.F.R. § 50.3 (1994).

[249] *Id.* § 50.3, note I.

[250] *Id.* § 50.3, note II.

[251] Friedlander interview, p. 11.

[252] Ibid. Contrary to Ms. Friedlander's comment, in 1994 the Department of Education recommended that DOJ participate as *amicus curiae* in two cases.

[253] Oneglia interview, p. 5.

### Data Collection and Reporting Requirements

Federal agencies' Title VI enforcement responsibilities cannot be administered effectively without adequate reporting requirements for recipients and adequate systems for analyzing data on programs of Federal financial assistance. DOJ's coordination regulations require agencies to "provide for the collection of data and information from applicants for and recipients of [F]ederal assistance sufficient to permit effective enforcement of Title VI."[254] The regulations indicate that agencies should collect data on the manner in which services will be provided by the program; the racial and ethnic composition of the eligible population; employment in the program, including the use of bilingual employees where necessary to serve limited-English-proficient applicants and recipients; the racial and ethnic impact of the location of the program and any relocation involved in the program; and the racial and ethnic composition of planning or advisory bodies that are an integral part of the program.[255] They also allow for the collection of additional data, such as demographic maps, "only to the extent that it is readily available or can be compiled with reasonable effort."[256] In all cases, Federal agencies are required to collect from applicants information on any lawsuits alleging discrimination filed against them, a description of any pending applications for assistance from other Federal agencies, a description of any civil rights compliance reviews the applicant has undergone, an assurance that the applicant will collect and maintain required data, and information on whether the applicant has been found in noncompliance with civil rights laws.[257]

In 1979, recognizing that "the collection of characteristic data on applicants for and beneficiaries of Federal assistance programs is the 'life blood' of a Title VI enforcement program,"[258] DOJ provided additional guidance to Federal agencies on their data collection obligations in a memorandum from the Assistant Attorney General for Civil Rights.[259] The memorandum stressed the importance of data collection for Title VI enforcement:

> Collecting and reviewing data on the race, ethnic background, age, and sex of persons applying for benefits or services under a federally assisted program is an essential element in determining the compliance status of that program. Additionally, this data may be required for enforcement purposes after a finding of probable non-compliance has been made.[260]

The memorandum directed Federal agencies "to establish and implement procedures whereby the race and ethnic background can be determined of persons applying for a service or benefit under a program to which you provide funds."[261] In addition to the race and ethnic data, the Assistant Attorney General for Civil Rights also recommended that information on the sex and age of applicants be collected.[262]

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[254] 28 C.F.R. § 42.406(a) (1994).

[255] *Id.* § 42.406(b).

[256] *Id.* § 42.406(c).

[257] *Id.* § 42.406(d),(e).

[258] U.S. Department of Justice, Civil Rights Division, "OMB Issues Policy on Racial and Ethnic Data Collection," *Title VI Forum*, vol. 5, no. 1 (Spring 1980), p. 3.

[259] Drew S. Days III, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, memorandum for the Heads of Executive Departments and Agencies, Re: collection of race, ethnic, age, and sex information on applications for benefits, Nov. 23, 1979.

[260] Ibid.

The Paperwork Reduction Act [263] and regulations implementing the act, which were published in 1983,[264] required that certain data requests by Federal agencies be submitted to the Office of Management and Budget (OMB) for review and approval. These included Federal regulations requiring the collection of data and information requests, such as forms, schedules, and questionnaires. The act directed OMB to consider whether the data were the least burdensome necessary for the performance of the requesting Federal agency's functions, whether the data duplicated information available elsewhere, and whether the data had practical utility.[265]

In correspondence with OMB, DOJ asked if its data collection provisions were covered by the act. In its response, OMB indicated that the portions of DOJ's regulations concerning compliance reports, transition plans, and self-evaluations were covered by the act, while sections of the regulations dealing with assurances and complaint investigations were not covered.[266] In 1984, DOJ communicated these requirements to the Federal civil rights offices.[267] DOJ identified five sections of its regulations implementing Title VI and section 504 of the Rehabilitation Act of 1973, as amended, that might impose recordkeeping or reporting requirements on the public.[268]

In response to a Commission inquiry about the effect of the Paperwork Reduction Act and OMB's regulations on the agencies' ability to collect data on the race and national origin of program beneficiaries, former Acting Deputy Assistant Attorney General for Civil Rights Gerald Jones indicated that "the effect on agencies' ability to collect pertinent civil rights data was minimal."[269] He wrote that the act may have "made the process of collecting data more difficult and cumbersome," but that "most agencies were easily able to justify the collection of racial and ethnic data for enforcement purposes."[270] Therefore, according to DOJ, the Paperwork Reduction Act has had no significant bearing on agencies' ability to collect racial and ethnic data relative to their federally assisted programs.

In 1995, in its newly revived newsletter, the *Civil Rights Forum*, DOJ reemphasized the importance of collecting civil rights data:

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[261] Ibid.

[262] Ibid.

[263] Pub. L. No. 96–511, 94 Stat. 2812 (codified as amended at 44 U.S.C. §§ 2904, 2905, 3501–3520 (1988)).

[264] 5 C.F.R. § 1320 (1994).

[265] *Id.* § 1320.4(b). OMB and DOJ agreed that all information requests covered by Executive Order 12,550 would first be cleared by DOJ and then forwarded to OMB for review. James C. Miller, III, Administrator for Information and Regulatory Affairs, Executive Office of the President, Office of Management and Budget, letter to Honorable William French Smith, Attorney General, U.S. Department of Justice, Aug. 12, 1981.

[266] U.S. Department of Justice, Civil Rights Division, "OMB Issues Paperwork Requirements," *Civil Rights Forum*, vol. 7, no. 2 (Spring 1984), pp. 6, 8.

[267] Ibid., p. 6.

[268] Ibid., pp. 6, 8.

[269] Gerald W. Jones, Acting Deputy Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, letter to Frederick Isler, Deputy Assistant Staff Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, May 16, 1994, Responses to CRS Follow-up Questions, no. 6, p. 4.

[270] Ibid.

> The first step [in determining whether different treatment is illegal discrimination] is to determine whether there is a difference in treatment based on some prohibited ground. . . . It takes data to objectively make this initial determination. That is why the Department of Justice regulation for coordinating title VI enforcement requires Federal grant agencies to collect data by race and other grounds on who is eligible to be served in a grantee's program and who is actually served.[271]

In addition, DOJ announced that CRD had developed a Geographic Information System to assist in civil rights analyses. The system provides demographic data for the entire United States at the census block level. It will soon have data on all 50 States, and the information will be available on-line to Federal agencies.[272]

### Technical Assistance to Recipients

DOJ's coordination regulations do not require Federal agencies to offer technical assistance to recipients of Federal financial assistance to help them comply with Title VI and other civil rights statutes. Given the complexity of Title VI requirements and the increasing tendency for Federal agencies to delegate Title VI compliance responsibilities to State and local recipient agencies, the need for agencies to develop comprehensive programs of technical assistance has become increasingly apparent. DOJ has failed to require, through its coordination regulations or in a Title VI manual, agencies to provide technical assistance and guidance to State and local recipient agencies.

### Outreach and Education and Community Group Liaison

Although DOJ's coordination regulations contain a section on "public dissemination of Title VI information,"[273] the public outreach requirements for Federal agencies are far too limited. Federal agencies are required only to "make available" their Title VI regulations and guidelines, and a similar requirement applies to State compliance programs.[274] The coordination regulations also direct Federal agencies to require recipients to "display prominently in reasonable numbers and places" posters informing the public about Title VI and to include statements of nondiscrimination in all written material that is distributed regularly to the public, as well as in broadcasts about the Federal agencies' programs.[275] Other than these requirements, the agencies are directed to ensure that such information is available in languages other than English.[276]

DOJ is not monitoring Federal agencies' compliance with its coordination regulations in this area. In its response to the Commission's survey, DOJ reported that it does not require agencies to disseminate information without a formal request from recipients, beneficiaries, or the affected community, nor does it monitor each agency to ensure that information about a federally assisted program is distributed in a language other than English.[277] The former Section Chief of CORS stated that at one time DOJ routinely required agencies to distribute posters and brochures in a prominent place so that affected individuals and communities would be informed of their rights. However, she also indicated a need for CORS to revive this function.[278]

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[271] U.S. Department of Justice, Civil Rights Division, "The Computer, Data, and Discrimination," *Civil Rights Forum*, vol. 9, no. 1 (Spring 1995), p. 6.

[272] Ibid., pp. 6–7.

[273] 28 C.F.R. § 42.405 (1994).

[274] *Id.* § 42.405(a)(b).

[275] *Id.* § 42.405(c).

[276] *Id.* § 42.405(d).

[277] DOJ Survey, Qs. 45, 46, p. 22.

Furthermore, the requirements in the coordination regulations are insufficient to ensure that Federal agencies undertake a comprehensive public education and outreach program. For example, the coordination regulations do not require Federal agencies to conduct education and outreach campaigns to inform the public about Title VI and the nature of its requirements for the agencies' particular programs, to hold civil rights conferences, or to maintain regular ties to community groups for the purpose of both informing them about Title VI and learning about their civil rights concerns. Despite the public's limited awareness of Title VI, DOJ does not require, in its regulations or manuals, that Federal agencies undertake comprehensive outreach and education campaigns.

## Federal Agency Oversight of State Title VI Compliance Programs

The Federal agencies distribute millions of dollars to States for the operation of continuing State programs. The States then redistribute the funds to subrecipients. DOJ's coordination regulations state the following:

> Each state agency administering a continuing program which receives federal financial assistance shall be required to establish a Title VI compliance program for itself and other recipients which obtain federal assistance through it. The federal agencies shall require that such state compliance programs provide for the assignment of Title VI responsibilities to designated state personnel and comply with the minimum standards established in this subpart for Federal agencies, including the maintenance of records necessary to permit federal officials to determine the Title VI compliance of the state agencies and the subrecipient.[279]

DOJ does not require that Federal agencies regularly monitor the State agencies' compliance programs, nor does it give guidance on the proper relationship between State and Federal agencies.

The former Section Chief of CORS expressed concern about delegation agreements between Federal agency and State agency recipients. Although she acknowledged that Federal agencies are permitted to delegate investigative responsibilities to the State agencies, she stated that the Federal agencies cannot delegate their enforcement authority to State recipients. Thus, for example, DOJ prevented the U.S. Department of Labor from requiring complainants to file with a State agency before proceeding to the Department of Labor for resolution of the complaint. However, according to the former Section Chief, CORS encourages smaller agencies to delegate their investigative responsibilities to State agencies or to larger Federal agencies, and maintains that State agencies should investigate all complaints against continuing State programs. She also stated that the ultimate responsibility for ensuring nondiscrimination in federally assisted programs lies with the Federal funding agency, and not with the State recipient.[280]

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[278] Oneglia interview, p. 4.

[279] 28 C.F.R. § 42.410 (1994).

[280] Oneglia interview, p. 7.

## Enforcement Support Activities: Oversight of Federal Agencies' Title VI Enforcement

In addition to developing Title VI policies and procedures for the Federal agencies, the Attorney General, through CORS, must also oversee the civil rights enforcement programs of the Federal agencies. Executive Order 12,250 and DOJ's own coordination regulations require DOJ to provide enforcement support. However, they also allow DOJ considerable discretion to determine the nature of this assistance.[281]

### Civil Rights Implementation Plans

Executive Order 12,250 requires the Attorney General to evaluate periodically the implementation of civil rights provisions covered by Executive Order 12,250, advise the heads of the agencies on the results of the evaluations, and provide recommendations for improving the implementation or enforcement of the nondiscrimination provisions.[282] Prior to Executive Order 12,250, CRD was only required to coordinate the submission of Federal agency budget records relating to Title VI enforcement.[283] To fulfill its current Executive Order 12,250 obligation, CORS relies exclusively on the submission and review of agencies' Civil Rights Implementation Plans to evaluate the implementation of civil rights laws by the Federal agencies.[284]

#### History and Purpose

According to CORS' Deputy Section Chief (Program Compliance), before Executive Order 12,250, DOJ required agencies to submit a Title VI Enforcement Plan.[285] The agencies submitted information to DOJ on training, staffing levels, complaints, and compliance reviews. All other statistical information was obtained through the Office of Management and Budget's Circular A–11.[286] The Civil Rights Implementation Plans are products of those two earlier documents.[287] In August 1981, DOJ sent for review and comment a draft document entitled "Guideline for Agency Implementation Plans."[288] The document was intended to provide guidance to the Federal agencies regarding the requirement to submit to the Attorney General plans for implementing their responsibilities under Executive Order 12,250.[289]

According to DOJ's "Guideline for Agency Implementation Plans," the Civil Rights Implementation Plans have a threefold purpose. First, the plans are designed to help DOJ in its oversight of Federal agencies' civil rights enforcement programs. The Civil Rights Implementation Plan should give CORS staff the ability to review the agencies' activities and provide them with assistance in such areas as management training, information systems, and civil rights training through the development of civil rights handbooks, regulations, and guidelines.[290]

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[281] *See* Exec. Order No. 12,250, 3 C.F.R. 298 (1981), *reprinted in* 42 U.S.C. § 2000d-1 (1988); 28 C.F.R. Subpart F (1994).

[282] Exec. Order No. 12,250, § 1–302, 3 C.F.R. 298 (1981) *reprinted in* 42 U.S.C. § 2000d-1 (1988). The Attorney General delegated this function to the Assistant Attorney General for Civil Rights in 1981. 28 C.F.R. § 0.51 (1994).

[283] U.S. Department of Justice, Civil Rights Division, "Agency A–11 Results," *Title VI Forum*, vol. 2, no. 2 (Summer 1977), p. 6.

[284] *See* Williams interview, p. 3.

[285] *See* Nickens interview, p. 5.

[286] Office of Management and Budget, Circular A–11, *Preparation and Submission of Budget Estimates*, July 2, 1983.

[287] Nickens interview, p. 5. *See also* U.S. Department of Justice, Civil Rights Division, *Report on Executive Order 12,250, October 1, 1982—September 30, 1984*, p. 34.

[288] U.S. Department of Justice, "Guideline for Agency Implementation Plans Required by Executive Order 12,250, 'Leadership and Coordination of Nondiscrimination Laws'" (undated) (hereafter cited as DOJ Guideline for Agency Implementation Plans). *See also* section 1–303 of Executive Order 12,250.

[289] DOJ Guideline for Agency Implementation Plans; section 1–403 of Executive Order 12,250.

[290] DOJ Guideline for Agency Implementation Plans, p. 3.

Second, the Civil Rights Implementation Plans are to serve as a "management tool" for the agencies' civil rights activities. According to the Guideline, "[b]y identifying responsibilities under statutes covered by the Order, by setting out long- and short-range objectives, and by associating workload and performance measures with budget information, the agency will have a blueprint for its operations."[291] The Civil Rights Implementation Plan primarily establishes objectives for the upcoming fiscal year, describes the achievements of the current fiscal year, and sets targets for resource levels for future fiscal years.[292]

Third, the Civil Rights Implementation Plans are meant to be a source document for public information on Federal agencies' civil rights enforcement programs. They are designed to serve as resource documents from which the general public or special interest groups can determine how an agency's civil rights program will affect issues or matters of particular concern to them.[293]

According to the Director of Program Compliance, who originally developed the framework for the Civil Rights Implementation Plans, the plans serve a variety of functions. They are planning tools for the agencies, reporting sources that provide DOJ with information and documentation on what the agencies are doing with respect to civil rights, and "information" documents for the general public.[294] He stated that the Civil Rights Implementation Plans are similar to agency planning documents, focusing on the agencies' long-range goals and priorities. Theoretically, the Civil Rights Implementation Plans are designed to provide a "roadmap" demonstrating how the agencies should meet their long- and short-range goals and objectives.[295] The Civil Rights Implementation Plans also have milestones that give a timeframe for achieving the agencies' goals and objectives. Essentially, agencies' Civil Rights Implementation Plans are "progress reports" describing the agencies' fiscal year activities with respect to the goals and objectives. They tell the coordinators what the agencies have done, what they plan to do in the near and longer range future, whether some activities were successful, and what changes were made to correct deficiencies in the program activities. In sum, an agency's Civil Rights Implementation Plan "should give a fair idea of where the agency really is and what the agency is doing." However, "you cannot really determine whether or not an agency is implementing civil rights statutes effectively just by reviewing its Civil Rights Implementation Plan."[296]

Thus, Civil Rights Implementation Plans were designed to provide DOJ with information on agencies' civil rights enforcement programs, but they were not intended to serve as an enforcement tool by DOJ to evaluate agencies' compliance or noncompliance with the civil rights statutes or measure their effectiveness in implementing civil rights responsibilities.

### DOJ's Guidelines for Civil Rights Implementation Plans

The basic framework for the Civil Rights Implementation Plans has not changed since its development in 1981. According to the Director of Program Compliance, all agencies' Civil Rights Implementation Plans should include and discuss the same criteria, but each agency has flexibility in plan format and presentation. The criteria are outlined in DOJ's Guideline for Agency Implementation Plans.[297]

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[291] Ibid.

[292] Ibid., pp. 3–4.

[293] Ibid., p. 4.

[294] Payne interview, p. 5.

[295] Ibid.

[296] Ibid.

[297] Ibid.; DOJ Guideline for Agency Implementation Plans.

In August 1991, John Dunne, the Assistant Attorney General for Civil Rights, sent a memorandum to agencies' civil rights directors on the development of the fiscal year 1992 Civil Rights Implementation Plans.[298] According to the memorandum, the fiscal year 1992 guidelines focused on streamlined plan "updates" for those agencies that had developed "base year" plans.[299] Agencies that had submitted base year plans only had to resubmit information in the updated plans if there had been a change in the information that was contained in the base year plan.[300]

In September 1993, James P. Turner, the former Acting Assistant Attorney General for Civil Rights, sent a memorandum to the agencies' civil rights directors with guidelines for developing their fiscal year 1994 base year Civil Rights Implementation Plan covering fiscal years 1994 to 1997.[301] In addition to the older civil rights statutes, the fiscal year 1994 Civil Rights Implementation Plan was to describe each agency's compliance with Title II of the Americans with Disabilities Act of 1990[302] and with section 504 of the Rehabilitation Act of 1973.[303]

The criteria established for Civil Rights Implementation Plans in the DOJ Guideline for Agency Implementation Plans mirror those outlined in the Title VI Enforcement Plan and the Office of Management and Budget's former A–11.[304] According to DOJ, the intent of the Guideline was to "create as small a paperwork burden as possible for agencies."[305] In general, the Civil Rights Implementation Plans describe the priorities and procedures established to meet civil rights enforcement responsibilities and list specific objectives to be achieved in future fiscal years.[306]

Agencies' Civil Rights Implementation Plans should have two major sections. The first should provide an overview of the agency's civil rights enforcement program. The section should include:[307]

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[298] John R. Dunne, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, memorandum to Civil Rights Directors, "Guidelines for the development of FY 1992 civil rights plan updates and supporting workload and performance data," Aug. 15, 1991 (hereafter cited as DOJ Guidelines for the FY 1992 Implementation Plan).

[299] Ibid., p. 1. According to DOJ, a "base year" civil rights plan will cover goals, objectives, priorities, and activities over a period of time. For example, an agency that submitted a FY 1990 base year plan will cover long range goals and objectives through fiscal year 1993. The plans submitted from fiscal year 1991 until 1993 are "updates" or progress reports on achievements made during the three year period to complete the long-range goals and objectives. Ibid.

In 1993, in its review of the Department of Housing and Urban Development's fiscal year 1993 Civil Rights Implementation Plan, CORS reiterated that agencies will submit base year plans to cover a multiyear period beginning in fiscal year 1994. Thereafter, agencies need not submit comprehensive base year plans each year, but only updates to the actual base year plan. The updates can be briefer, with "direct, concise" objectives for the fiscal year and information about progress made in the previous year. Stewart B. Oneglia, Chief, Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, letter to Leonora L. Guarraia, General Deputy Assistant Secretary for Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, June 15, 1993.

[300] DOJ Guidelines for the FY 1992 Implementation Plan, pp. 1–2.

[301] James P. Turner, Acting Assistant Attorney General, Civil Rights Division, memorandum to Civil Rights Directors, "Guidelines for the Development of FY 1994 Civil Rights Implementation Plans and Supporting Workload and Performance Data," Sep. 7, 1993.

[302] 42 U.S.C. §§ 12,101–12,213 (Supp. V 1993). The act prohibits discrimination against qualified individuals on the basis of disability.

[303] 29 U.S.C. § 794 (1988 & Supp. V 1993).

[304] DOJ Guideline for Agency Implementation Plans, p. 1; Payne interview, p. 5.

[305] DOJ Guideline for Agency Implementation Plans, p. 1.

[306] Ibid., p. 3.

(1) *Mission*—includes a brief description of the overall purpose of the civil rights enforcement program and identifies the national problem(s) being addressed.

(2) *Authority*—includes any authorizing legislation or other jurisdictional basis for the establishment of the agency's civil rights enforcement program. The section should emphasize the impact of recently passed legislation or court decisions on the agency's objectives for its civil rights program.

(3) *Program Coverage*—includes a listing of the Federal financial assistance programs administered by the agency and a description of the type of assistance which the programs provide. This subsection should address whether or not any of these programs include "covered employment," employment practices covered by Title VI, Title IX, or Section 504.[308] In addition, the subsection should provide information on the recipients of the agency's programs and on the nature of the assistance provided.

(4) *Approach*—includes a brief description of how the agency plans to implement its responsibilities in (a) compliance and enforcement (preaward, postaward, complaint processing, monitoring, etc.); (b) policy development (guidelines, manuals, etc.), technical support and staff training, management and supervision (oversight); and (c) technical assistance (activities that assist recipients or applicants in complying with civil rights requirements or provide information to beneficiaries). The subsection should also include information on other civil rights enforcement activities of the agency.

(5) *Organization*—describes how the agency structures its civil rights office to best accomplish its approach. In addition, the agency should show the relationship between headquarters civil rights office and regional or field offices or subagencies, and indicate lines of authority.

(6) *Staff and Budgetary Resources*—describes the available staff and budgetary resources in light of the agency's workload requirements. This subsection should contain relevant quantitative data as part of the narrative.

The second major section of an agency's Civil Rights Implementation Plan should state the agency's long-range policy goals and major objectives. The long-range policy goals are defined as the ultimate purposes or "ends" for which the agency's civil rights program exists. According to the Guideline, these long-range goals should serve as the framework for formulating the more specific major program objectives.[309] The major objectives are strategies for achieving the agency's long-range goals, or statements of "how" an organization plans to pursue its program responsibilities to achieve its long-range goals. According to the Guideline, there should be at least one major objective corresponding to each of the categories outlined in the approach section (complaint processing, compliance reviews, etc.).[310]

The section also should list specific short-term objectives that translate the major objectives into "specific work activities which can normally be accomplished using available staff and resources during one fiscal year."[311] DOJ anticipated at least one short-term objective for each major objective.[312]

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[307] Ibid., pp. 4–10.

[308] Ibid., p. 5. Employment practices covered under Title VI are those that: 1) exist in a program where a primary objective of the federal financial assistance is to provide employment, or 2) cause discrimination on the basis of race, color or national origin with respect to beneficiaries of the assisted programs. 28 C.F.R. § 42.402(f) (1994).

[309] DOJ Guideline for Agency Implementation Plans, p. 9.

[310] Ibid.

The Director of Program Compliance stated that although there is "virtue in consistency" when it comes to the Civil Rights Implementation Plans, he would like to add some new criteria to the plans.[313] He said that future revisions of the guidelines for completing the Civil Rights Implementation Plans are necessary. The revisions may include eliminating some of the guidelines and focusing more attention on the quality of an agency's preaward and compliance reviews.[314]

### CORS' Review of the Civil Rights Implementation Plans

According to CORS' "Implementation Plan Review Procedures," issued in February 1982, DOJ coordinators are responsible for reviewing the agencies' Civil Rights Implementation Plans.[315] The coordinator should conduct an initial review of the plan against the guideline requirements and seek additional information from the agency submitting the plan where the plan has major deficiencies.[316] The coordinator then prepares a "review memorandum" for the Section Chief, summarizing the plan and recommending the plan for approval or disapproval. The coordinator also prepares a letter from the Section Chief to the appropriate agency official approving or disapproving the plan.[317]

Federal agencies must submit their Civil Rights Implementation Plans to DOJ around the middle of November of each year. The coordinator assigned to the agency has 2 to 3 weeks to review the plan and prepare the review memorandum and letter.[318] Designated CORS managers then review this package.[319] According to one coordinator, by the time her recommendations pass through three review stages, very little of her "strong language remains in the recommendations."[320] A final letter is then sent to the agency with recommendations, responding to the Civil Rights Implementation Plan. According to the Director of Program Compliance, the letter does not state whether an agency is in compliance with Executive Order 12,250.[321]

The procedures direct the coordinators to address the following issues in their reviews:

> 1) Is the "thread of continuity" present which allows one to follow through from the establishment of goals and objectives and the setting of priorities to specific fiscal years activities in the major civil rights functions?
>
> 2) Are goals, objectives, and activities supported by data and narrative?

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[311] Ibid., p. 10.

[312] Ibid.

[313] Payne interview, p. 6.

[314] Ibid., p. 7.

[315] Allen Payne, Supervisor, Agency Liaison Unit, Coordination and Review Section, memorandum to CORS coordinators on "Implementation Plan Review Procedures," Feb. 16, 1982 (hereafter cited as CORS Implementation Plan Review Procedures).

[316] Ibid. *See also* Payne interview, p. 7.

[317] CORS Implementation Plan Review Procedures; Payne interview, p. 7.

[318] Payne interview, p. 7.

[319] Ibid., p. 7. The package is first reviewed by Margay Williams, the Supervisory Civil Rights Analyst who heads the Agency Liaison unit, then by Allen Payne, the Program Compliance Director, and finally by Stewart Oneglia, the Chief of CORS. Ibid.

[320] Brown interview, p. 4.

[321] Payne interview, p. 7.

3) Are milestones and work products established? Can progress in implementing the plan be measured?

4) Does agency organization and staffing reflect proposed activities? Does the data provided in the [workload and performance section] support narrative descriptions of organization, functions, and activities?[322]

The Director of Program Compliance said that it was easy to distinguish between a "good" Civil Rights Implementation Plan and a "bad" one.[323] The "good" plan, generally, but not always, comes from an agency that assigns its civil rights office staff to prepare and complete the plan, rather than a program manager for federally assisted programs. The "good" plan is completed by staff who have a "sincere commitment and interest" in civil rights enforcement and are aware and understand the civil rights policies, priorities, and problems that may already exist in certain Title VI programs."[324] The agencies with good Civil Rights Implementation Plans usually "devote considerable resources" to their completion.[325]

He said that "bad" plans are incomplete reports without focus that provide no clear insight into the agency's civil rights operations. The "bad" plans usually are written in general terms, focus on only one civil rights statute or program, and are not prepared by a civil rights compliance officer or by "anyone" in the civil rights office. Such plans often are limited in overall effectiveness as an "action plan."[326]

One of the coordinators who reviews Civil Rights Implementation Plans for six agencies said that "good" plans include objectives with timeframes for their achievement. A good plan should provide a "picture" of what the agency is trying to achieve, the level of the agency's civil rights resources, and how the agency is utilizing its resources. She said that, in her opinion, the "only bad plan is no plan at all."[327]

Another coordinator stated that some important factors she looks for while reviewing Civil Rights Implementation Plans are: 1) coherent outlines; 2) planning and organization; 3) specific statements indicating what the agency plans to do, and in what timeframe it intends to accomplish its objectives; and 4) a statement of accomplishments for the previous year. Once that information is analyzed, she compares it with the Civil Rights Implementation Plan from the previous year to determine how well the agency enforces Title VI.[328]

Regardless of whether CORS finds an agency's Civil Rights Implementation Plan to be "good" or "bad," CORS never rejects a plan. Although the CORS procedures for reviewing implementation plans require that CORS recommend either approval or disapproval of the plan, the procedures also indicate that "our objective is to approve strong plans rather than reject weak ones."[329] One coordinator indicated that only once has she recommended that CORS "reject" a Civil Rights Implementation Plan. She made the recommendation because the plan contained insufficient information and the Federal agency made no corrective measures.[330] Another coordinator could not recall any plan being rejected.[331] According to the Director of Program Compliance, CORS has never "rejected" any Civil Rights Implementation Plan. He explained that rather than reject a Civil Rights Implementation Plans, CORS staff focus their responses on how the agency addressed guideline requirements and on making suggestions for improving the plan. In other words, CORS' response is intended to provide the agencies with DOJ's concerns and suggestions for improvement. In his view, "there is no point in rejecting [a Civil Rights Implementation Plan] submitted in November that CORS does not evaluate until June." He said CORS preferred to try to correct problems informally by interacting with the agencies.[332]

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[322] CORS Implementation Plan Review Procedures, p. 2.

[323] Payne interview, p. 6.

[324] Ibid., p. 6.

[325] Ibid.

[326] Ibid.

[327] Brown interview, p. 4.

[328] O'Brien interview, p. 2.

[329] CORS Implementation Plan Review Procedures, p. 1.

One coordinator indicated that even when DOJ identified a deficiency when reviewing an agency's Civil Rights Implementation Plan, it might suggest that the agency correct the problem, but it never provided the agency with a target date for doing so.[333]

To help the Commission assess CORS' review process, CORS submitted four reviews of agencies' Civil Rights Implementation Plans.[334] The first of these was CORS' review of the Department of Housing and Urban Development's (HUD) fiscal year 1993 Civil Rights Implementation Plan, which was an update of an earlier plan. In her letter to HUD evaluating the plan, the former Section Chief of CORS wrote: "HUD's update generally provides an excellent basis for planning, directing, and assessing the operation of HUD's civil rights program. This update, which resembles a base-year plan, is extremely comprehensive and thorough. . . . This year's update is responsive to the comments we made in our review of last year's submission."[335] The letter made minor suggestions for improving HUD's plan.[336] An attached memorandum by the coordinator responsible for HUD was consistent with the final letter sent by the former Section Chief of CORS to HUD.[337]

The Commission's review of HUD's plan confirmed that the plan is comprehensive. However, the plan does not provide sufficient information on HUD's reorganization of its Fair Housing and Equal Opportunity Office. Furthermore, it does not provide sufficient information on HUD's Title VI compliance procedures and activities in areas such as complaint processing, preaward reviews, postaward reviews, and routine monitoring. For instance, the plan gives no indication of what is involved in a HUD preaward or postaward review. The plan's goals and objectives section generally conforms to DOJ's guideline, in that its objectives imply criteria for measuring accomplishment. The section on HUD's progress, while describing numerous HUD activities, does not indicate how these activities related to the previous years' goals and objectives.[338] Finally, HUD's plan gives no indication that HUD was using the plan as a management tool. DOJ's review of the plan did not address these issues.

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[330] Brown interview, p. 4.

[331] Talian interview, p. 5.

[332] Payne interview, p. 7; Payne telephone interview, p. 2.

[333] King interview, p. 2.

[334] The Coordination and Review Section submitted reviews of the U.S. Department of Agriculture's Office of Civil Rights Enforcement and agency heads, the Department of Housing and Urban Development, the Department of Education, and the Department of Health and Human Services.

[335] Stewart B. Oneglia, Chief, Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, letter to Leonora L. Guarraia, General Deputy Assistant Secretary, Office of the Assistant Secretary for Fair Housing and Urban Development, June 15, 1993, p. 1.

[336] Ibid., pp. 2–3.

[337] Catherine O'Brien, Civil Rights Program Specialist, Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, memorandum to Stewart Oneglia, Chief, Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, on "Review of Department of Housing and Urban Development's (HUD) Fiscal Year 1993 Civil Rights Implementation Plan Update" (no date).

The Commission also evaluated CORS' review of the Department of Education's (DOEd) fiscal year 1993 Civil Rights Implementation Plan. In her review letter to DOEd, the former Section Chief of CORS found that the plan was "thorough, informative, and well-organized." DOJ's recommendations for improving the plan focused on issues related to DOEd's responsibilities under Title II of the Americans with Disabilities Act.[339] An attached memorandum[340] from the coordinator responsible for DOEd provided a detailed analysis of the plan and indicated that the plan was "comprehensive and conforms to our guideline requirements."[341] The coordinator added, "[DOEd's] implementation plan ranks as one of the best developed by Federal agencies subject to our [Executive Order] 12,250 oversight authority."[342]

Although DOEd's plan follows the outline in DOJ's guidelines and provides a significant amount of information about the Department's civil rights activities, the plan is not sufficiently detailed to serve as a basis for an assessment of DOEd's civil rights enforcement program by DOJ or as a comprehensive source of public information. It does not provide enough information about DOEd's Office for Civil Rights' organization, staffing, and resources; procedures for handling complaint investigations, compliance reviews, etc.; or how resource allocation decisions are made. Furthermore, the plan does not fulfill one of the major purposes envisioned by DOJ for the Civil Rights Implementation Plans: it shows no indication of being used by DOEd as a management tool. In particular, the plan's sections on long-range goals, major objectives, and short-term objectives are not developed as DOJ's guideline requires. The goals and objectives specified by DOEd are vague and generally do not "imply criteria for measuring accomplishments," as required by DOJ.[343] Again, DOJ's review does not mention these deficiencies.

The Commission also analyzed CORS' review of the Department of Health and Human Services' (HHS) fiscal year 1993 Civil Rights Implementation Plan Update. In her letter to HHS reviewing the plan, the former Section Chief of CORS indicated that "[O]ur review has found that your agency's submission satisfactorily addresses our guideline requirements. . . . [T]he information presented is thorough, informative, and well-organized."[344] The letter made minor suggestions for improving the plan.[345] The attached memorandum from the CORS coordinator responsible for HHS provided a detailed analysis of the plan[346] and concluded that the plan was "comprehensive and conforms to our guideline requirements."[347] Furthermore, he added that "HHS's plan [ranks] among the best developed and summarized by Federal agencies subject to our Executive Order 12,250 oversight authority."[348]

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[338] U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity, "Fiscal Year 1993 Civil Rights Implementation Plan Update," submitted to the U.S. Department of Justice, Dec. 4, 1992.

[339] Stewart B. Oneglia, Chief, Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, letter to Jeanette J. Lim, Acting Assistant Secretary for Civil Rights, U.S. Department of Education, May 13, 1993.

[340] Joseph Talian, memorandum to Stewart B. Oneglia, Chief, Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, on "Review of the Department of Education's FY 1993 Implementation Plan Update," Apr. 23, 1993.

[341] Ibid., p. 4.

[342] Ibid., pp. 4–5.

[343] DOJ Guideline for Agency Implementation Plans, p. 9.

[344] Stewart B. Oneglia, Chief, Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, letter to Ronald G. Copeland, Acting Director, Office for Civil Rights, U.S. Department of Health and Human Services, Mar. 30, 1993, p. 1.

[345] Ibid.

There were significant problems with the HHS plan. The plan does not adequately describe the organization of the HHS Office for Civil Rights. The section on the approach to major civil rights functions related to federally assisted programs does not provide sufficient detail on what HHS is doing in critical areas, such as complaint processing, preaward reviews, postaward reviews, and routine monitoring. The plan's goals and objectives section does not conform to the DOJ guideline. In particular, in the sections on major and short-term objectives, the plan refers to an attachment entitled "FY 1993 Annual Operating Plan, Director's National Priorities." The Annual Operating Plan is a very vague statement of goals, not the specific statement of measurable objectives with timeframes for completing them required by DOJ. The plan's discussion of its progress during the previous year, which is very short, does not relate the progress to stated goals and objectives. The HHS plan shows no indication of being used as a management tool by the agency, and does not provide sufficient information for either DOJ or the general public to understand the HHS civil rights program.[349] As with the other agencies, DOJ's review does not point out these deficiencies in the HHS plan.

The fourth review submitted by CORS was a review of fiscal year 1993 Civil Rights Implementation Plans submitted by the Department of Agriculture (USDA), including a plan submitted by its "umbrella" civil rights office (the Office of Advocacy and Enterprise, recently renamed the Office of Civil Rights Enforcement) and plans submitted by the six USDA agencies that provide Federal financial assistance and have other major civil rights responsibilities. In her review letter, the former Section Chief of CORS commended the Office of Advocacy and Enterprise for its "efforts to assist the program agencies in developing acceptable plans."[350] She noted some of the plans were "excellent," and most had improved substantially over previous years.[351] However, she detailed numerous problems with the plans. For instance, the number of Civil Rights Implementation Plans submitted by USDA varies from year to year. She indicated that all of the USDA agencies should submit plans each year.[352]

Although DOJ's other review letters did not address the "Progress Reports" sections of agencies plans, the former Section Chief of CORS gave very specific guidance in her USDA review letter. This guidance also should have been included in her letters to HUD, DOEd, and HHS. She wrote:

> Goals and objectives are the most critical part of any plan. The "Progress Report" should include every short-term objective of the prior year very specifically describe the progress, status, or outcome of each short-term objective. For instance, a plan should not merely state that "progress was made toward a particular short-term objective." Also, if an agency has not

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[346] Joseph Talian, memorandum to Stewart B. Oneglia, Chief, Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, on "Review of the Department of Health and Human Services' FY 1993 Implementation Plan Update" (no date).

[347] Ibid., pp. 3–4.

[348] Ibid.

[349] U.S. Department of Health and Human Services, "FY 1993 Annual Implementation Plan," submitted to the U.S. Department of Justice, Feb. 19, 1993.

[350] Stewart B. Oneglia, Chief, Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, letter to Robert Franco, Acting Director, Office of Advocacy and Enterprise, U.S. Department of Agriculture, May 13, 1993, p. 2.

[351] Ibid.

[352] Ibid.

achieved an objective, the plan should give the reasons why the agency has not attained the objective.

Some plans repeat the same objectives yearly; the plans should explain the reasons for any lack of progress. The objectives should include interim steps and timetables so that the agency can be more specific, and demonstrate progress toward achieving objectives.[353]

The former Section Chief of CORS found some of the USDA plans excellent, while others needed improvement. In essence, the plans that needed improvement did not distinguish accurately between "federally conducted programs" and "direct assistance programs" and did not thoroughly address the implementation of Title II. Some agency heads did not support their conclusions; some updates were "burdensome" and not concise; the complaint processing form for federally assisted programs did not include data on the Americans with Disabilities Act; and some of the plans repeated the same objectives from previous years and did not explain the reasons for any lack of progress.[354]

The Commission compared the former Section Chief of CORS' remarks with its own assessments of the Civil Rights Implementation Plans of the Office of Advocacy and Enterprise,[355] the Food and Nutrition Service,[356] and the Soil Conservation Service,[357] and the combined plan of the Farmers Home Administration and the Rural Development Administration.[358] The Commission generally concurred with her evaluations of these agencies' plans' deficiencies.

Based on the Commission's own review of the Civil Rights Implementation Plans of the Federal agencies, both those discussed above and those discussed in later chapters, it is evident that few, if any, agencies are complying with the DOJ Guideline for Agency Implementation Plans. As noted in chapter 15, few of the plans provide sufficient information for CORS or the general public to garner an understanding of their civil rights programs, and none is being used or could be used as management tools by the agencies. None of the agencies followed DOJ's Guideline in preparing the sections on long-range policy goals and major and short-term objectives. Given the deficiencies of most agencies' Civil Rights Implementation Plans, and given that reviewing the plans currently is CORS' only means of overseeing agencies' civil rights enforcement programs, it is surprising that CORS never rejects an agency's plan. Generally, CORS has been satisfied with all the agencies' Civil Rights Implementation Plans despite the noted deficiencies. This suggests that CORS is making no effort to ensure that the Federal agencies comply with the guidelines and maintain effective civil rights enforcement programs.

Furthermore, one of the CORS staff members indicated that, in the past, DOJ has not ensured that all Federal agencies administering federally assisted and conducted programs submitted a Civil Rights Implementation Plan. She said that when the Department of Transportation did not submit a plan, the staff prepared a letter to be sent to the Department requesting that a plan be submitted. However, under the prior administration, DOJ refused to send the letter.[359]

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[353] Ibid., pp. 4–5.

[354] Ibid., pp. 1–5.

[355] U.S. Department of Agriculture, Office of Advocacy and Enterprise, Fiscal Year 1993 Civil Rights Implementation Plan, submitted to the U.S. Department of Justice, Oct. 2, 1992.

[356] U.S. Department of Agriculture, Food and Nutrition Service, "Fiscal Year 1993 Civil Rights Implementation Plan."

[357] U.S. Department of Agriculture, Soil Conservation Service, "Fiscal Year 1993 Civil Rights Implementation Plan Update."

[358] U.S. Department of Agriculture, Farmers Home Administration/Rural Development Administration, "Plan for Administering Federal Assistance Programs and Activities for Fiscal Year 1993," submitted to the U.S. Department of Justice, July 31, 1992.

[359] Sheppard interview, p. 3.

## DOJ's Views on the Use of Civil Rights Implementation Plans

DOJ staff stated that the Civil Rights Implementation Plans, at their best, explain what Federal agencies are doing and what they plan to do in civil rights.[360] They "should give a fair idea of where the agency really is and what the agency is doing."[361] However, they emphasized that the Civil Rights Implementation Plans do not allow DOJ to reach findings as to whether agencies are in compliance with Title VI.[362] The Director of Program Compliance noted that the plans are only "paper documents" and are not enough to ensure agencies' compliance.[363] The coordinators all agreed with this assessment.[364] One of the coordinators said that she cannot measure compliance with Title VI just by reviewing an agency's Civil Rights Implementation Plan. Implementation plans only reveal what an agency plans to do over a 3-year period in the area of civil rights enforcement.[365]

One coordinator indicated that the Civil Rights Implementation Plans serve the valuable purpose of keeping the Federal agencies "on their toes."[366] However, several staff members raised concerns that the information in agencies' Civil Rights Implementation Plans may be inaccurate. The Deputy Section Chief (Program Compliance) indicated that it was his belief that most Federal agencies only are enforcing Title VI "on paper."[367] The Director of Program Compliance said that CORS needed to improve its assessments of the accuracy of the data submitted in the Civil Rights Implementation Plans.[368] One coordinator regretted that coordinators have to "take it for granted" that agencies actually are doing what they say they are doing in their Civil Rights Implementation Plans.[369] Another coordinator said that "most agencies have not been doing the work they claim in their reports." He said that the only way for CORS to verify the data from the agencies would be for CORS to conduct onsite reviews of the agencies.[370]

The Deputy Section Chief (Program Compliance) indicated that he supports requiring agencies to submit more information in their Civil Rights Implementation Plan.[371] The Director of Program Compliance said that DOJ's Guideline for preparing Civil Rights Implementation Plans needs to be updated to reflect better the quality of the agencies' civil rights enforcement programs. He indicated that the guideline should be shortened and focus more attention on preaward reviews or the compliance efforts of the agencies.[372] However, he cautioned that there is "virtue in consistency" when it comes to Civil Rights Implementation Plans because it was difficult to get the agencies to understand what was wanted in the current plan. If a new guideline were prepared, the agencies would once again need sufficient time to understand how to follow it.[373]

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[360] Nickens interview, p. 5; Brown interview, p. 4; King interview, p. 2.

[361] Payne interview, p. 5.

[362] Nickens interview, p. 5

[363] Ibid.

[364] Williams interview, p. 3; Purvis interview, p. 3; Brown interview, p. 4; Talian interview, p. 5

[365] Brown interview, p. 4.

[366] Talian interview, p. 3.

[367] Nickens interview, p. 4.

[368] Payne interview, p. 8.

[369] Brown interview, p. 4.

[370] Purvis interview, p. 3.

[371] Nickens interview, p. 6.

[372] Payne interview, p. 7.

According to CORS staff, the most promising avenue for enhancing CORS' Title VI enforcement support and oversight of the Federal agencies is not to revise the guidelines for the Civil Rights Implementation Plans, but to reinstitute the use of other enforcement tools that were abandoned during the 1980s. CORS staff maintains that the Civil Rights Implementation Plans are not a good substitute for DOJ's interagency surveys and onsite reviews.[374]

The Assistant Attorney General for Civil Rights agrees that CORS should not rely exclusively on reviewing Civil Rights Implementation Plans.[375] To improve CORS' oversight of Federal agencies, CORS has created three teams—implementation plan team, agency survey team, and agency liaison team—to develop alternatives to the Civil Rights Implementation Plans.[376] The implementation plan team is exploring more efficient ways to collect data from the agencies to streamline and reduce the agency reporting requirements while also improving the substantive value of the information collected.[377] Although it is essential for CORS to reevaluate the reporting process, it also is essential that the implementation plan team develop a plan that requires the agencies to demonstrate a relationship between their enforcement goals and activities and their budgeting process.

### The Title VI Enforcement Plan

DOJ's coordination regulations require each Federal agency covered by Title VI to prepare an "enforcement plan" setting out its priorities and procedures.[378] According to the regulations:

> This plan shall be available to the public and shall address matters such as the method for selecting recipients for compliance reviews, the establishment of timetables and controls for such reviews, the procedure for handling complaints, the allocation of its staff to different compliance functions, the development of guidelines, the determination as to when guidelines are not appropriate, and the provision of civil rights training for its staff.[379]

The Civil Rights Implementation Plan is the only plan submitted to DOJ by the Federal agencies. According to DOJ, it is the successor to the Title VI Enforcement Plan.[380] However, the Civil Rights Implementation Plan does not constitute a Civil Rights Enforcement Plan as specified in the coordination guidelines. DOJ's guideline for preparing a Civil Rights Implementation Plan does not require Federal agencies to provide the kind of detailed information specified in the coordination guidelines.

There is a clear distinction between an implementation plan and an enforcement plan. A Title VI Implementation Plan is a written plan that details the tools the agencies will utilize to ensure consistent and effective implementation of the goals and objectives of the Title VI statute, such as policies, procedures, guidelines, and regulations. Implementation plans also address the development of policies, procedures, guidelines, and regulations on preaward reviews (desk audit), postaward reviews (desk audit), onsite compliance reviews, complaint investigations, remedies, sanctions, fund termination, training, technical assistance, outreach and education, and theories of discrimination. In addition, implementation plans consider other civil rights issues affecting Title VI, such as environmental justice, health care delivery, judicial decisions, policy reforms, new data systems, and quality assurance programs. Implementation plans also address the method of selecting recipients for compliance reviews and the actions taken by agencies for various deficiencies.

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[373] Ibid., p. 6.

[374] Williams interview, p. 3; Nickens interview, p. 5; Payne interview, p. 7; Purvis interview, p. 3; Talian interview, pp. 5–6; King interview, p. 2.

[375] Patrick letter, p. 5.

[376] Ibid.

[377] Ibid.

[378] 28 C.F.R. § 42.415 (1994).

[379] *Id.*

[380] U.S. Department of Justice, Civil Rights Division, "AAG Approves Implementation Plans," *Civil Rights Forum*, vol. 6, no. 1 (Fall 1982), p. 10.

A Title VI Enforcement Plan is a written plan for civil rights enforcement that outlines the agency's priorities, goals, and objectives to ensure consistent and effective enforcement of Title VI. An enforcement plan addresses and identifies matters such as specific resources for Title VI programs; the number of staff committed to Title VI enforcement; the allocation of staff to different compliance functions; strategies for conducting adequate preaward desk-audit reviews, postaward desk-audit reviews, and onsite compliance reviews; Title VI civil rights training seminars; outreach and education; technical assistance to State and local agency staff and the frequency and nature of this assistance; civil rights training for the EEO/civil rights staff; data collection; litigation support; and fund termination. Also, an enforcement plan includes strategies to address specific civil rights issues that are unique to the particular Federal financial assistance program or activity. Enforcement plans also establish milestones, controls, and identify compliance officers for all enforcement activities. Enforcement plans include the prior year's workload and responsibilities and a detailed summary discussion of the named recipients' deficiencies and any corrective remedies, sanctions, litigation, or fund termination actions. Finally, enforcement plans include a 5-year trend analysis of all Title VI bases and issues.

In light of the differences in these plans, the Civil Rights Implementation Plan as used by DOJ is not a good substitute for a Civil Rights Enforcement Plan.

## Interagency Surveys

Until 1981, CORS utilized interagency surveys as a proactive step in ascertaining the strengths and weaknesses of enforcement programs for Federal agencies that provide financial assistance. CORS published comprehensive guidelines outlining a 20-point process for conducting reviews, from initiating contact with the agency, to making arrangements for the review, to contacting relevant public interest groups that monitor the agency's programs, to determining the necessity of going to regional office locations, among other steps.[381]

According to DOJ's "Guidelines for Conducting Interagency Surveys," there are two criteria for being selected for review:

> Generally, OCR attention will be directed to those disbursing agencies which administer the most covered programs. Reviews should also be concerned with those agency components which have made little effort to enforce civil rights or whose enforcement programs are known to be of low quality.[382]

The most important link in the chain is determining which issues should be addressed during the review. The Guidelines outline 13 issue examples, including:

1) The quantity, quality, and timeliness of complaint investigations and pre- and postaward reviews;

2) Adherence by the agency, in implementing its civil rights program, to the standards it has established for itself;

3) The sufficiency of staffing and organizational structure;

4) The adequacy of staff knowledge on programmatic and civil rights issues;

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[381] DOJ Guidelines for Conducting Interagency Surveys.

[382] DOJ Guidelines for Conducting Interagency Surveys, p. 1.

5) The need for additional regulations, guidelines, handbooks, or other instructional material;

6) The availability of, and the need for, training and cross-training;

7) The quality of technical assistance provided to program staff, recipients, and beneficiaries;

8) Interaction (or lack thereof) between civil rights, program, and general counsel offices;

9) Central office control over regional civil rights operations and/or the general responsiveness of headquarters to civil rights field operations;

10) Whether the agency collects sufficient racial/ethnic civil rights data and/or the adequacy of the procedures used to analyze that data;

11) Issues related to "covered employment";

12) The reliance on State recipients to conduct civil rights functions and/or the sufficiency of the guidance and technical assistance provided these recipients by the agency;

13) The adequacy of the dissemination of information to the public (especially to populations with limited English proficiency) concerning their rights and responsibilities under applicable civil rights statutes and the availability of assistance programs (e.g., has the agency established guidelines for its recipients that detail how the public is to be so informed).[383]

DOJ applied these guidelines in an interagency survey of the Department of Housing and Urban Development (HUD) in 1977.[384] As a result of this interagency survey, DOJ and HUD entered into a Memorandum of Understanding to ensure that HUD corrected the violations.[385] Based on deficiencies described in the report, HUD agreed to act on DOJ's findings on and recommendations to HUD's civil rights enforcement program. DOJ found that 1) HUD had not developed a comprehensive Title VI compliance review program;[386] 2) the program was understaffed;[387] 3) HUD had not analyzed all of the complaints filed under its Community Development Block Grants program to determine whether they involved possible violations of Title VI;[388] 4) HUD's civil rights enforcement staff was not adequately trained;[389] and 5) HUD was not collecting data necessary to determine if minorities were equitably represented in HUD-funded programs.[390]

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[383] Ibid., p. 6.

[384] *See* "Memorandum of Understanding Between the Department of Housing and Urban Development and the Civil Rights Division, Department of Justice Regarding the Enforcement of Title VI of the Civil Rights Act of 1964," July 6, 1979. The memorandum lists DOJ's findings and recommendations from the interagency survey report.

[385] Ibid. *See also* Thomas J. Henderson, Deputy Director and Director of Litigation, Lawyers' Committee for Civil Rights Under Law, testimony before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, Sept. 30, 1994, pp. 7–8.

In his testimony, Mr. Henderson notes that, after 15 years, HUD still has not complied with the Memorandum of Understanding and recommends that DOJ and HUD negotiate a new Memorandum of Understanding to address the continued deficiencies. Ibid.

[386] *See* "Memorandum of Understanding Between the Department of Housing and Urban Development and the Civil Rights Division, Department of Justice Regarding the Enforcement of Title VI of the Civil Rights Act of 1964," July 6, 1979, p. 6.

[387] *See* ibid., p. 4.

[388] *See* ibid., p. 6.

[389] *See* ibid., p. 9.

[390] *See* ibid., p. 10.

These reviews were stopped in 1981 as outside the authority of Executive Order 12,250.[391] However, according to CORS' Deputy Section Chief (Program Compliance), the surveys identified the weaknesses in the agencies' programs.[392] The added benefit was "with DOJ identifying the weaknesses in the programs, the agencies were able to look at their programs and determine what improvements were needed."[393] "After the surveys, the agencies became aware of their problems, and they knew that DOJ would review their responses and suggest changes in their program."[394] According to a DOJ investigator, the interagency surveys would help to improve the efficiency and effectiveness of DOJ's coordination and review process.[395] The surveys would be effective particularly "for smaller agencies or new agencies."[396] The consensus of DOJ officials is that the surveys were effective and should be revitalized.

In 1995, CORS created an interagency survey team to begin identifying agencies for onsite surveys. The Assistant Attorney General for Civil Rights stated that because CORS does not have the resources to conduct indepth onsite reviews of every agency, CORS intends to improve its informal contact with the agencies instead.[397] In support of this initiative, the Assistant Attorney General for Civil Rights conducted a meeting for Federal agency civil rights directors and general counsels on May 5, 1995, to discuss the strengthening of Title VI and Executive Order 12,250 enforcement.[398] To maintain contact after this meeting, the agency liaison team plans to schedule periodic indepth discussions with each agency to exchange information and viewpoints, resolve concerns, and gather information to fulfill CORS' oversight responsibilities.[399]

## Onsite Reviews of Federal Agencies

Although properly designed and executed implementation plan reviews and interagency surveys provide an overview of agencies' civil rights enforcement programs, they do not provide enough information for CORS to monitor effectively the programs' quality. Without onsite visits to the Federal agencies, CORS is left without a means to ensure that the Federal agencies are reporting their activities accurately and complying with DOJ's regulations and recommendations.[400] According to a CORS supervisory civil rights analyst, onsite audits are the only way CORS can verify that the Federal agencies are actually accomplishing the goals and objectives stated in their Civil Rights Implementation Plans.[401] Therefore, it is essential for DOJ to provide CORS staff with the authority and resources to conduct onsite evaluations of each Federal agency's Title VI enforcement program.

DOJ's own coordination regulations give the Assistant Attorney General for Civil Rights considerable authority to move beyond a mere paper review process provided through the Civil Rights Implementation Plans and the Interagency Surveys. The regulations state that "the Assistant

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[391] Oneglia interview, p. 2.

[392] Nickens interview, p. 3.

[393] Ibid.

[394] Ibid.

[395] King interview, p. 3.

[396] Talian interview, p. 2.

[397] *See* ibid.

[398] Ibid.

[399] Ibid.

[400] *See* Payne interview, p. 7.

[401] Williams interview.

Attorney General may issue such directives and take such other action as he deems necessary to insure that Federal agencies carry out their responsibilities under Title VI."[402] James P. Turner, former Acting Assistant Attorney General for Civil Rights, equated this oversight responsibility for Title VI with Congress' broad oversight authority over the Federal agencies.[403] According to him, oversight for both Congress and DOJ requires "an orderly review of compliance activities."[404]

The Director of Program Compliance indicated that CORS' predecessor office, the Federal Programs Section, conducted Title VI audits until 1981.[405] These audits were used to assess Title VI enforcement in federally assisted programs.[406] During these audits, coordinators went onsite to each Federal agency with a set of preliminary questions and asked each agency to explain its Title VI enforcement activities during the year.[407] The last audit was conducted in 1981.[408]

Although CORS has not conducted onsite audits since 1981, CORS managers and staff support the use of onsite audits to ensure enforcement of Title VI by the Federal agencies.[409] The former Section Chief of CORS stated that CORS should exercise its authority under Executive Order 12,250 to conduct onsite audits to "ensure effective and consistent enforcement of civil rights statutes."[410]

The Director of Program Compliance stated that Title VI onsite audits can provide CORS with information not available from the Civil Rights Implementation Plans.[411] Onsite audits afford CORS the opportunity to determine the level of Title VI training and expertise among the staff of the Federal agencies, as well as examine whether the Federal agencies are equipped with sufficient methods and procedures to enforce Title VI.[412] Although a paper review process allows CORS to evaluate an agency's Title VI enforcement program, it does not permit CORS to view Title VI enforcement in perspective with the agency's other civil rights enforcement activities. Onsite monitoring, unlike a paper review, gives CORS an opportunity to examine the effect that other agency program and civil rights compliance activities have on Title VI enforcement.[413]

Onsite reviews also can serve as an effective tool in conjunction with the Civil Rights Implementation Plans. According to the Deputy Section Chief (Program Compliance), the Federal agencies only "comply on paper" with Executive Order 12,250 and the enforcement of Title VI.[414] Therefore, it is important for CORS staff to conduct field visits, interview agency Title VI staff, review

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[402] 28 C.F.R. § 42.412(b) (1994).

[403] Turner interview, p. 6.

[404] Ibid.

[405] Payne interview, p. 3.

[406] Turner interview, p. 6.

[407] Ibid.

[408] *See* Turner interview, p. 6, and Payne interview, p. 3.

[409] *See, e.g.*, Oneglia interview, p. 4; Williams interview, p. 3; Nickens interview, p. 6.

[410] Oneglia interview, p. 4.

[411] Payne interview, pp. 7–8.

[412] Ibid.

[413] Ibid.

[414] Nickens interview, p. 4.

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firsthand the implementation of policies, and examine the guidance that agencies are providing to their recipients.[415] Onsite visits to the Federal agencies would give CORS staff the opportunity to conduct effective and active followup on the Civil Rights Implementation Plans and ensure that agencies remedy any identified deficiencies.[416]

The coordinators who review Civil Rights Implementation Plans support the position of the Deputy Section Chief (Program Compliance). According to a CORS equal opportunity specialist, CORS' recommendations to the agencies each year would be stronger if coordinators were allowed to conduct onsite followup evaluations of agencies' compliance review processes.[417] In addition, onsite reviews would allow CORS coordinators to accompany the Federal agencies as they conduct compliance reviews of their recipients and provide CORS with a clearer understanding of each Federal agency's enforcement efforts.[418]

Although CORS plans to conduct onsite audits of the Federal agencies as part of its efforts to "reinvigorate" Title VI, the former Section Chief of CORS stated that it will be difficult to conduct onsite evaluations at CORS' current staffing levels.[419] With this in mind, CORS staff is in the process of identifying some agencies for indepth surveys, although CORS' limited resources will not permit an indepth onsite review of every agency.[420]

## Letters of Finding Project

Another way in which CORS can ensure that the Federal agencies are fulfilling their responsibilities under Title VI in a consistent manner is for CORS to review agencies' letters of findings to determine whether agencies are applying the law correctly. DOJ's coordination regulations require agencies to report to the Attorney General "the receipt, nature, and disposition of all such Title VI complaints."[421] According to the former Section Chief of CORS, in 1986 CORS had a "Letters of Finding Project."[422] Under the project, CORS required each agency to submit their letters of finding detailing the results of their complaint investigations. CORS was to review the letters of finding to ensure consistent enforcement of all the statutes covered by Executive Order 12,250. CORS also planned to establish a system to identify and codify the major civil rights issues raised in the letters of finding. She indicated that the Letters of Finding Project was never fully implemented. She said that CORS never acted on the policy questions raised in the letters of finding, nor did it transmit its analyses or reports back to the agencies.[423] The Deputy Section Chief (Legal) recommended reviving the project as part of DOJ's Title VI "reinvigoration" efforts.[424] Although the Assistant Attorney General for Civil Rights indicated that the letters of finding project might be considered in the future, no plans have been made yet to revive it.[425]

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[415] Ibid.

[416] *See* ibid.

[417] Purvis interview, p. 3.

[418] Ibid.

[419] Oneglia interview, p. 9.

[420] Patrick letter, p. 5.

[421] 28 C.F.R. § 42.408(d) (1994).

[422] Oneglia interview, p. 5; *see also* Friedlander interview, p. 5.

[423] Oneglia interview, p. 5.

[424] Friedlander interview, p. 5.

[425] Patrick letter, p. 7.

## Facilitation of the Development of Delegation Agreements

Executive Order 12,250 requires the Attorney General to initiate cooperative programs between and among the Federal agencies to improve the coordination of civil rights compliance efforts.[426] Because many recipients receive Federal financial assistance from more than one agency to fund similar or related activities, the Federal agencies need cooperative programs or delegation agreements to prevent an overlap in Title VI enforcement.[427] To encourage cooperation and assist agencies in the development of delegation agreements, Executive Order 12,250 requires the Attorney General to develop sample memoranda of understanding for the Federal agencies.[428]

DOJ's coordination regulations require delegation agreements whenever a substantial number of recipients receive funding from two or more agencies for similar or related purposes, or when two or more agencies cooperate in administering assistance for the same recipients.[429] Thus, cooperative arrangements allow for functional coordination of Title VI enforcement based on the types of programs and recipients.[430] According to DOJ, delegation agreements between and among Federal agencies are intended to:

> promote consistent and coordinated enforcement of covered nondiscrimination provisions, increase the efficiency of compliance activity, and reduce burdens on recipients, beneficiaries, and Federal agencies by consolidating compliance responsibilities, by eliminating duplication in civil rights reviews and data requirements, and by promoting consistent application of enforcement standards.[431]

Thus, delegation agreements allow Federal agencies to utilize their already limited Title VI enforcement budgets in the most cost-effective way possible.

According to DOJ's *Civil Rights Forum*, the 1984 model delegation agreement was developed in response to problems with the previous delegation system.[432] In 1976, CRD conducted a study of the delegation agreement system by surveying 27 Federal grant agencies to determine their delegation needs.[433] By performing a comprehensive study, DOJ was able to identify agencies that required new or updated delegation agreements reflecting organizational and programmatic changes. It also was able to recognize the need for more detailed descriptions of the duties of both the lead and delegating agencies.[434] In addition, the survey indicated a need for greater accountability in the implementation of these agreements.[435]

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[426] Exec. Order No. 12,250, § 1-207, 3 C.F.R. 298 (1981), *reprinted in* 42 U.S.C. § 2000d-1 (1988).

[427] U.S. Department of Justice, Civil Rights Division, "DOJ Drafts New Delegation Agreement," *Civil Rights Forum*, vol. 7, no. 3 (Summer/Fall 1984), p. 7.

[428] Exec. Order No. 12,250, § 1-207, 3 C.F.R. 298 (1981), *reprinted in* 42 U.S.C. § 2000d-1 (1988).

[429] 28 C.F.R. § 42.413(a) (1994).

[430] *See* U.S. Department of Justice, Civil Rights Division, "Interview with the Assistant Attorney General," *Civil Rights Forum*, vol. 6, no. 2 (Winter/Spring 1983), p. 3. Prior to the delegation system established by DOJ in 1984 and 1985, the Department of Education assumed responsibility for all Federal financial assistance provided to elementary and secondary schools and institutions of higher learning. The Department of Health and Human Services assumed responsibility for all programs providing funds to medical facilities and hospitals. *See* U.S. Department of Justice, Civil Rights Division, "DOJ Drafts New Delegation Agreement," *Civil Rights Forum*, vol. 7, no. 3 (Summer/Fall 1984), p. 7.

[431] U.S. Department of Justice, "An Agreement Between [Delegating Agency] and [Lead Agency] to Delegate Certain Civil Rights Compliance Responsibilities for [Types of Recipients]," final revised model, July 1985, p. 1 (hereafter cited as DOJ Model Delegation Agreement).

[432] U.S. Department of Justice, Civil Rights Division, "DOJ Drafts New Delegation Agreement," *Civil Rights Forum*, vol. 7, no. 3 (Summer/Fall 1984), p. 12.

[433] Ibid.

To ensure that Title VI is enforced effectively, DOJ developed a detailed description of each agency's duties under a delegation agreement. The current agreements provide for the delegation of an agency's compliance activities, including complaint investigations, compliance reviews, and negotiations for voluntary compliance.[436] Under DOJ's cooperative arrangements, one agency is designated as the lead agency and the other agency is known as the delegating agency.[437] As of November 1992, all existing delegation agreements designated the Department of Education as the lead agency for smaller delegating agencies with limited resources and expertise in Title VI enforcement.[438]

According to the DOJ model, the lead agency is responsible for maintaining current files on all compliance activities, including preaward and postaward reviews, complaint investigations, and noncompliance actions undertaken on applicants and recipients.[439] The lead agency is required to provide a summary of these activities to the delegating agency at least at the end of each fiscal year.[440] However, the model does not require the lead agency to provide this summary information to CORS or to ensure that the information is received by the delegating agency in time for inclusion in either agency's Civil Rights Implementation Plans.

The detailed duties of the lead agency are almost identical to agencies' enforcement responsibilities under DOJ's coordination regulations. However, the lead agency is required to provide a copy of all letters of findings to both the Assistant Attorney General for Civil Rights and the delegating agency.[441] If compliance cannot be achieved voluntarily and both agencies fund the applicant or recipient, then when the lead agency initiates an enforcement action, the delegating agency must be given an opportunity to participate as a party in a joint administrative hearing.[442] In addition, if only the delegating agency funds the applicant or recipient and the lead agency determines that compliance cannot be achieved voluntarily, the lead agency must refer the matter to the delegating agency for its own independent action.[443] In either case, the model agreement requires only that the lead agency notify the Assistant Attorney General for Civil Rights of any referral or any results of the enforcement action.[444] The model does not require CRD to take any affirmative steps to monitor the agreement.

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[434] Ibid.

[435] Ibid.

[436] Ibid., p. 7.

[437] *See* 28 C.F.R. § 42.413(a)(2) (1994); DOJ Model Delegation Agreement, p. 5. All delegation agreements must be in writing, approved by the Assistant Attorney General for Civil Rights, and published in the *Federal Register*. 28 C.F.R. § 42.413(a)(2) (1994).

[438] *See* U.S. Department of Justice, "Delegation Agreements as of November 15, 1992," DOJ document submission, Nov. 9, 1993 (USCCR files). Currently, the Department of Education serves as the lead agency in delegation agreements with the National Science Foundation, the National Aeronautics and Space Administration, the General Services Administration, the Agency for International Development, the National Endowment for the Humanities and the National Endowment for the Arts, the Environmental Protection Agency, the Department of State, the Department of Commerce, the Department of Interior, and ACTION. Ibid.

[439] DOJ Model Delegation Agreement, p. 2.

[440] Ibid.

[441] Ibid., p. 3.

[442] Ibid.

[443] Ibid.

The delegating agency is required to provide technical assistance and training to the lead agency to inform the lead agency of its programs and procedures.[445] The delegating agency also is required to perform preaward reviews of applicants that do not require supplemental information or field reviews.[446] Although the delegating agency is permitted to make its own decisions regarding whether or not to pursue a noncompliance action, if the delegating agency does not choose to pursue an action after a determination by the lead agency, then the delegating agency must notify both the lead agency and the Assistant Attorney General for Civil Rights within 15 days of receiving the noncompliance notice from the lead agency.[447]

In addition to delegation agreements between and among Federal agencies, some agencies delegate their Title VI investigative responsibilities to State agencies. Although CORS encourages smaller agencies to delegate their investigative duties to State agencies or larger Federal agencies, CORS does not support the delegation of enforcement authority to State agencies.[448] For example, according to former CORS Section Chief Stewart Oneglia, the Department of Labor attempted to require complainants to file with the State agency and exhaust State procedures before proceeding to the Department of Labor for a resolution of the complaint.[449] CORS prevented the Department of Labor from continuing this practice because the ultimate responsibility for ensuring nondiscrimination in federally assisted programs lies with the funding agency.[450]

Although DOJ has effectively detailed the responsibilities of both the lead agency and the delegating agency, DOJ has not defined clearly CORS' responsibility to coordinate and monitor delegation agreements. Currently, under the prototype agreement, CORS relies on the lead agency to provide CORS with copies of all letters of findings and notify CORS of any referrals for litigation.[451] However, CORS has not taken any affirmative or proactive steps to ensure that the cooperative arrangements are serving the compliance needs of both agencies. Instead, CORS simply treats the lead agency's duties under the delegation agreement as part of its overall Title VI enforcement activities without recognizing the additional responsibility the lead agency has accepted.[452]

According to the Director of Program Compliance, delegation agreements may be effective in theory, but he is not satisfied personally that CORS learns enough about the actual operation of the agreements.[453] He expressed concern that

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[444] Ibid.

[445] *See* ibid., pp. 4–5.

[446] Ibid., p. 4; *see also* 28 C.F.R. § 42.407(b) (1994).

[447] DOJ Model Delegation Agreement, p. 5.

[448] Oneglia interview, p. 7.

[449] Ibid.

[450] Ibid., p. 7.

[451] DOJ Model Delegation Agreement, pp. 4–5.

[452] *See* Payne interview, transcript pp. 17–18. It appears that CORS' only concern with respect to delegation agreements involves the jurisdiction of the agencies involved. For example, CORS recently acknowledged that DOEd and HHS have been unable to resolve which agency shall assume the lead for certain classes of recipients for which both are responsible. Stewart B. Oneglia, Chief, Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, letter to Jeanette Lim, Acting Assistant Secretary, Office for Civil Rights, U.S. Department of Education, May 13, 1993, p. 3.

[453] Payne interview, transcript p. 17.

CORS is "pretty far removed" from the operations of the delegation agreements, despite the fact that the agencies are supposed to report on the operation of the delegation agreements in their Civil Rights Implementation Plans.[454] However, because CORS does not actively monitor the agreements, the reality of CORS' review is that it relies on the agencies to notify it of any problems with the delegation system.[455]

To remedy these concerns, CORS has begun to review the existing delegation agreements for necessary revisions and to determine whether additional delegation agreements are necessary.[456] CORS has suggested that the new Social Security Administration enter into a delegation agreement with the Department of Health and Human Services and has offered to assist in facilitating that agreement.[457]

In addition to facilitating delegation agreements between agencies, CORS also has entered into an agreement to conduct Title VI enforcement activities itself on behalf of a DOJ-funded program. In 1990, CORS signed a memorandum of understanding with the National Institute of Corrections agreeing to investigate complaints filed against National Institute of Corrections recipients.[458] Although CORS has the expertise to conduct Title VI complaint investigations, this memorandum of understanding represents a conflict of interest with CORS' oversight and monitoring responsibilities. In essence, this memorandum of understanding places CORS in the position of monitoring and overseeing its own Title VI complaint investigations conducted for the National Institute of Corrections.

## Litigation Support

Although CORS is not a litigation section in CRD, it is authorized to provide civil rights litigation support to DOJ's litigating sections. Under Executive Order 11,764,[459] CRD authorized CORS to assist DOJ's litigation sections in identifying incidents of services discrimination and targeting recalcitrant recipients for possible suit.[460] CORS' 1981 Implementation Plan for Executive Order 12,250 states:

> CORS will provide litigation support both to the Civil Division of DOJ and the litigating sections of CRD. . . . Provision of this support assures consistency and uniformity in the Federal government's legal positions on civil rights issues related to the statutes, whether developed through coordination of the government's administrative enforcement efforts or through litigation. In cases where the Civil Rights Division is instituting legal proceedings, CORS maintains close contact with the particular litigating section and provided input as appropriate to assure a consistent government position.[461]

In its most recent report on DOJ's activities in achieving the purpose of the Executive order, which was transmitted to the Office of Management and Budget on January 19, 1994, DOJ reported that CORS:

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[454] Ibid.

[455] Ibid.

[456] Patrick letter, p. 6.

[457] Ibid.

[458] Ibid., p. 4.

[459] Exec. Order No. 11,764, 3 C.F.R. 849 (1971–1975), *revoked by*, Exec. Order No. 12,250, 3 C.F.R. 298 (1981), *reprinted in* 42 U.S.C. § 2000d-1 (1988).

[460] U.S. Department of Justice, Civil Rights Division, "Title VI—Fifteen Years Later . . . ," *Title VI Forum*, vol. 4, no. 2 (Fall 1979), p. 9.

[461] U.S. Department of Justice, Civil Rights Division, Coordination and Review Section, "Implementation Plan for Executive Order 12250, Leadership and Coordination of Nondiscrimination Laws," Apr. 10, 1981, pp. 5–6 (hereafter cited as CORS Implementation Plan).

> frequently provides significant advice in order to ensure consistency and uniformity in the Government's legal positions on civil rights statutes. Assistance to litigating offices takes many forms, including providing advice on the strategy of a case or on particular motions or briefs, writing pleadings and affidavits, answering interrogatories, or even furnishing testimony. In this manner, Section participation ensures that the Federal Government's civil rights efforts are consistent, whether carried out through the administrative enforcement process or through litigation.[462]

The Commission reviewed DOJ reports on its Executive Order 12,250 activities from 1980 to 1994. The review revealed only two instances in which the report cited litigation support activities relating to Title VI. In 1985, CORS attorneys provided litigation support in the aftermath of a court decision finding that the Department of Housing and Urban Development had provided Federal funds to racially segregated housing projects in east Texas.[463] According to DOJ, the CORS attorneys met with representatives of CRD and HUD "to analyze the district court decision, to assess updated information on what the Department of Housing and Urban Development was accomplishing in East Texas, and to discuss available options in order to determine the next actions the Government should take."[464] The report did not indicate the substance of the CORS attorneys' analysis and advice. In 1980, CORS provided a legal opinion to the Department of Housing and Urban Development on whether Federal funds could be used to rehabilitate a housing project to be inhabited solely by Native Americans. CORS took the position that Title VI prohibited the use of Federal funds for this purpose.[465] A district court subsequently found that use of Federal funds for the housing project was permitted under Title VI.[466]

According to the Deputy Section Chief (Legal), most CORS attorneys only "occasionally" review briefs and comment on cases.[467] Furthermore, CORS does not have a close working relationship with the CRD sections empowered to litigate under Title VI. The former Section Chief of CORS indicated that when a Federal agency requests that DOJ litigate a Title VI case, the agency communicates directly with the section litigating the case, and there is no CORS involvement. She stated that CORS does not record or monitor the Title VI cases referred to CRD's litigation sections.

Under its current structure, CORS is limited to providing litigation support. Another possible role for CORS would be to conduct Title VI litigation in Title VI cases not clearly under the jurisdiction of other litigating sections, such as environmental justice cases.[468] Mr. Turner, former Acting Assistant Attorney General for Civil Rights, indicated that he supported giving CORS the ability to litigate Title VI cases that do not fit easily into the expertise of the existing CRD sections, if there are enough such cases to justify it.[469]

Giving CORS litigation responsibilities would increase the prestige of the section within CRD. Although the former Acting Assistant Attorney General for Civil Rights indicated that he does not believe that CORS has been given low priority because it is not a litigating section,[470] several CORS staff members suggested that CORS suffered from not having litigation responsibilities. According to the Deputy Section Chief (Legal), "litigating sections do tend to get more staff." She noted that the Public Access Section had been authorized to hire 10 or 12 new equal opportunity specialists for fiscal year 1994, whereas CORS, with more than 900 complaints and only five permanent investigators, was having trouble getting authorization just to replace two people who had left.[471] Given DOJ's budget process, under which DOJ's funds are allocated to two accounts, an account for litigating divisions and an account for divisions responsible for justice programs,[472] it seems likely that CORS would have access to greater resources if it were given litigation responsibilities.

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[462] U.S. Department of Justice, *Report on Executive Order 12,250, October 1, 1989—September 30, 1992*, pp. 72–73.

[463] Young v. Pierce, Civil Action No. P–80–8–CA (E.D. Tex. Feb. 3, 1994) (notice of filing and desegregation plan). Currently, HUD is operating under this 1994 desegregation plan.

[464] U.S. Department of Justice, Civil Rights Division, *Report on Executive Order 12,250, October 1, 1984—September 30, 1985*, pp. 61–62.

[465] U.S. Department of Justice, Civil Rights Division, *Report on Executive Order 12,250, October 1, 1982—September 30, 1984*, pp. 60–61.

[466] St. Paul Intertribal Hous. Bd. v. Reynolds, 564 F. Supp. 1408, 1413 (D. Minn. 1983).

[467] Friedlander interview, p. 9.

[468] *See* Turner interview, p. 3; Friedlander interview, p. 10.

[469] Turner interview, p. 3.

## Legal Assistance and Policy Interpretations

In 1979, CRD identified several plans to effectuate its responsibilities under Title VI. One option CRD considered was to provide Federal agencies with enhanced legal assistance in the form of formal legal opinions and reviews of regulations, issues, policies, and questions of law. CRD asserted that this form of legal assistance would help it identify critical issues affecting Title VI enforcement and correct those problems.[473] This option was incorporated into CORS' 1981 "Implementation Plan for Executive Order 12,250."[474] The Legal Assistance Branch of CORS was charged with providing legal assistance, including issuance of legal opinions, on issues arising under Title VI and other statutes prohibiting discrimination in federally assisted programs.[475]

According to a 1979 issue of DOJ's *Civil Rights Forum*, CORS provided legal assistance and opinions to agencies, at their request, on a continuing basis. This legal assistance included evaluations of and recommendations on Title VI handbooks, guidelines, enforcement plans, and policy directives, and the review of and consultation in the development of Title VI regulations.[476]

DOJ's most recent report to the Office of Management and Budget indicates that during the period between October 1, 1989, and September 30, 1992, CORS "continued to provide information, assistance, and policy guidance on the legal requirements of the civil rights statutes covered by the Executive Order. This guidance usually followed requests from individual agencies about their enforcement obligations under the civil rights statutes."[477] The report gave several examples of CORS' legal assistance and policy interpretation activities. Only one of these activities—CORS' analysis of whether the Smithsonian Institution is covered by Title VI, section 504, and Title IX—concerned Title VI.[478]

CORS gave Federal agencies legal assistance or advice on several occasions in 1994. On July 25, 1994, CORS sent a letter to the Department of Health and Human Services commenting on its proposed regulations modifying the requirements for States' intrastate funding formulas under the

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[470] Ibid., p. 3.

[471] Friedlander interview, p. 12.

[472] *See* discussion on the budget process, pp. 66–72 above.

[473] U.S. Department of Justice, Civil Rights Division, "Title VI—Fifteen Years Later . . . .," *Title VI Forum*, vol. 4, no. 2 (Fall 1979), p. 9.

[474] CORS Implementation Plan, p. 7.

[475] Ibid., p. 7.

[476] U.S. Department of Justice, Civil Rights Division, "Title VI—Fifteen Years Later. . . .," *Title VI Forum*, vol. 4, no. 2 (Fall 1979), p. 7.

[477] U.S. Department of Justice, *Report on Executive Order 12,250, October 1, 1989—September 30, 1992*, p. 67.

[478] Ibid., pp. 69–70.

Older Americans Act.[479] On August 9, 1994, CRD told the Department of Labor that it had the legal authority under Title VI to require recipients to provide notices to non-English speakers in their native languages when a significant proportion or number of individuals speak a particular language.[480] DOJ also reviewed the Empowerment Zone legislation to determine how Title VI applies to zone designation decisions.[481] CORS became involved in two Title VI complaints. In one case, CORS required the U.S. Department of Agriculture to submit its letter of finding to CORS for review *before* it was issued.[482] Finally, DOJ gave input to the Department of Transportation on reorganizing its civil rights office.[483]

## DOJ Oversight of State and Local Title VI Compliance

Executive Order 12,250 does not give DOJ any direct authority to ensure that State and local agency recipients of Federal funds are in compliance with Title VI. The Federal agencies' have primary responsibility for ensuring that their recipients comply with the law. However, given the increasing tendency for Federal funds to be distributed through State and local agencies, it is important that DOJ review State and local agencies to assess their compliance. Without such reviews, DOJ cannot determine whether the Federal funding agencies, whose responsibility it is to ensure that their State and local agency recipients are in compliance with the law, are complying with Title VI. Yet, CORS apparently has no relationship with State and local agencies.

Several CORS staff members support increased CORS involvement with State and local agencies. The Deputy Section Chief (Program Compliance) recommended that a more proactive CORS coordination and enforcement program require CORS to provide technical assistance directly to State and local agency recipients and not just to the Federal agencies.[484] One of the CORS coordinators went further, suggesting that CORS should evaluate State and local recipients' compliance with Title VI during the course of its reviews of Federal agencies.[485]

On April 20, 1995, CORS conducted its first training program for a State or local agency for the Tennessee State Comptroller's Office.[486] Because many State and local agencies are on CORS' mailing list for the *Civil Rights Forum*, CORS anticipates future requests for State and local training. For this reason, it is essential for CORS to develop programs tailored to the specific issues facing State and local government agencies, such as the application of Title VI to block grant programs, self-assessments, and the development of methods of administration.

## Comment on Proposed Legislation

As the central coordination entity for Federal Title VI enforcement, CORS is in an ideal position to comment on any proposed legislation that may affect civil rights. According to the Attorney General's 1992 report to Office of Management and Budget, CORS routinely "reviews pending legislation affecting its responsibilities" under Executive Order 12,250.[487] CRD and CORS report that they have commented on a variety of legislative initiatives such as nondiscrimination protection for individuals with HIV/AIDS,[488] telecommunications accessibility,[489] and sovereign immunity for States under section 504.[490] During the period covered by the most recent report, CORS worked primarily on issues related to passage of the Americans with Disabilities Act of 1990.[491]

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[479] King letter, attachment, answer no. 5, p. 6. Older Americans Act of 1965, 42 U.S.C. §§ 3001–3058ee (1988 & Supp. V 1993).

[480] Ibid., p. 7.

[481] Ibid., p. 8.

[482] Ibid., pp. 7, 8–9.

[483] Ibid., pp. 10–11.

[484] Nickens interview, p. 4.

[485] Purvis interview, p. 3.

[486] Patrick letter, p. 6.

[487] U.S. Department of Justice, *Report on Executive Order 12,250, October 1, 1989—September 30, 1992*, p. 41.

Reviewing proposed legislation is an essential element of CORS' mandate to ensure consistent and effective enforcement of Title VI. However, there is no evidence that CORS examines new legislation or assesses its impact on civil rights enforcement. Although CORS comments on legislation that directly involves civil rights, CORS fails to comment on other legislation that affects civil rights, such as new Federal financial assistance funding statutes.

## Review of Fund Termination and Suspension Decisions

Although the head of each Federal funding agency has the primary responsibility for enforcing Title VI, DOJ is required to assure coordination and consistency in Title VI enforcement among the Federal agencies.[492] DOJ's guidelines for Title VI enforcement require the Federal agencies to notify DOJ, in advance, of any refusal, deferral, or termination actions on any applications for Federal financial assistance.[493] The guidelines also require advance notice to DOJ of any hearings on an application for Federal financial assistance or other enforcement actions or procedures undertaken by a Federal agency.[494] The broad notification language of the guidelines indicates that DOJ cannot coordinate Title VI enforcement effectively unless the Federal agencies inform DOJ of any and all actions taken on an application for Federal financial assistance. However, there is no indication that the Federal agencies are providing DOJ regularly with notice on their fund termination and suspension decisions or that DOJ is reviewing the decisions.

## DOJ's Views on the Quality of Federal Agencies' Title VI Enforcement

DOJ's oversight of the Federal agencies' Title VI enforcement efforts is limited to review and comment on the agencies' Civil Rights Implementation Plans. This limited form of review is entirely inadequate for DOJ to conclude whether the Federal agencies are in compliance with Title VI and other civil rights statutes. DOJ has not conducted critical oversight activities, such as interagency civil rights surveys and onsite reviews of Federal agencies, in recent years. Moreover, the Civil Rights Implementation Plan, as conceived by DOJ and developed by the agencies, is not a good substitute for the Title VI enforcement plan required by DOJ's coordination regulations.

DOJ has not adequately fulfilled its oversight responsibilities in the areas of reviewing agencies' letters of finding, and fund termination and suspension decisions; facilitating the delegation agreements among agencies and between agencies and State recipients; and providing litigation support, legal assistance, and policy interpretations to the agencies. Although State and local governments have been given increasing amounts of Title VI enforcement responsibility, DOJ relies entirely upon the Federal agencies to oversee their Title VI activities.

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[488] U.S. Department of Justice, Civil Rights Division, *Report on Executive Order 12,250, October 1, 1987—September 30, 1988*, pp. 15–16.

[489] Ibid., p. 16.

[490] U.S. Department of Justice, Civil Rights Division, *Report on Executive Order 12,250, October 1, 1986—September 30, 1987*, pp. 28–29.

[491] U.S. Department of Justice, Civil Rights Division, *Report on Executive Order 12,250, October 1, 1989—September 30, 1992*, p. 41.

[492] 28 C.F.R. § 50.3, Part V. Coordination (1994).

[493] *Id.*

[494] *Id.*

## Coordination Initiatives and Agency Liaison Activities

A third major function of CORS under Executive Order 12,250 is to conduct its own public outreach and education programs and community group liaison activities relating to Title VI. Furthermore, CORS should provide assistance to the Federal agencies, such as public outreach and education information on Title VI, technical support, and training to improve each agency's Title VI enforcement efforts.[495]

### Public Outreach and Education on Title VI

CORS was engaged actively in Title VI-related education and outreach activities when the section was first established.[496] However, CORS virtually has ceased its involvement in this area. A national program to inform the public about Title VI is necessary given the far reach of Title VI and the absence of public awareness or understanding of this provision of the Civil Rights Act of 1964.[497] As the Federal coordinator for all Title VI enforcement activities, CORS is the logical entity to initiate such a campaign.

CORS staff believe that CORS should enhance its outreach and education activities. A CORS investigator expressed his views about a "national Title VI enforcement effort" that would include programs to educate the public about Title VI. He said that DOJ should publicize Title VI with press releases and other forms of publicity similar to its public education campaign on the Americans with Disabilities Act of 1990.[498] In addition, DOJ should conduct regional Title VI conferences emphasizing issues facing particular minority concentrations, for example, Latinos in the Southeast and Native Americans in the Southwest. The CORS investigator would also like to see the development of minority "think tanks" whereby organizations such as the American Bar Association and the National Urban League may serve as conduits for disseminating Title VI information.[499]

A coordinator added that educating the public about Title VI issues would help to improve Title VI enforcement. He suggested that CORS should become a Federal presence at public forums and meet regularly with national civil rights organizations.[500] A CORS staff attorney agreed that DOJ needs to focus more attention on community outreach. Both DOJ and other Federal agencies need to stress community outreach and education in civil rights, particularly in the area of Title VI. He said that those affected by Federal financial assistance need to be informed of their rights under the civil rights statutes.[501]

The Director of Program Compliance indicated that CORS is planning to return to a more active Title VI education program.[502] Among CORS preliminary draft recommendations for the new Assistant Attorney General for Civil Rights is a recommendation that CRD "reestablish its conference attendance and participation program with civil rights organizations. . . to provide outreach, information, and technical assistance to the civil rights groups and the general public."[503]

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[495] *See* Exec. Order No. 12,250, § 1-206, 3 C.F.R. 298 (1981), *reprinted in* 42 U.S.C. § 2000d-1 (1988).*See also* CORS Implementation Plan, pp. 4–6, 11–12.

[496] *See* U.S. Department of Justice, Civil Rights Division, Coordination and Review Section, "Preliminary Draft Recommendations for Implementing an Effective Civil Rights Coordination Program" (no date) submitted by Theodore Nickens, Deputy Section Chief, Coordination and Review Section, no. 4 (hereafter cited as CORS preliminary draft recommendations).

[497] 42 U.S.C. §§ 2000d to 2000d-7 (1988).

[498] 42 U.S.C. §§ 12,101–12,213 (Supp. V 1993).

[499] Waters interview, p. 2.

[500] Purvis interview, p. 3.

[501] Stewart interview, p. 3.

[502] Payne interview, p. 3.

DOJ recently developed an exhibit booth to provide outreach and information to the general public about CRD, "especially coordination governmentwide of Title VI and the similar cross-cutting civil rights nondiscrimination provisions that are linked to the receipt of Federal financial assistance."[504] The booth was exhibited at the 1994 annual conferences of several major civil rights organizations.[505] DOJ also distributed literature at these conferences. According to DOJ, these new public outreach and education initiatives have received "extremely positive" feedback, and DOJ has been invited to use its exhibit at several major conferences again next year.[506] To expand the operation of the exhibit booth, the Assistant Attorney General for Civil Rights has removed the management and staffing of the booth from CORS.[507] By removing the booth from CORS, CRD will be able to staff the booth with personnel from the entire division and use CRD's budget to defray the costs of the booth.[508]

In addition to its exhibit booth, CORS has begun to develop a Title VI brochure that will explain Title VI in simple terms and will describe the procedures for filing a Title VI complaint.[509] CORS intends to make the brochure available at conferences and similar meetings of public interest groups.[510]

## Liaison with Community Groups

The former Section Chief of CORS stated that to ensure that CORS' implementation of its Title VI coordination responsibilities is responsive to the civil rights concerns of the community, CORS needs to reach out to community organizations to seek their input on important civil rights issues and ways of improving the Title VI enforcement effort. She indicated that in recent years CORS has had "very minimal" contact with civil rights organizations, either to discuss policies or to promote cooperation. Although CORS has not met with organizations concerning Title VI, staff did meet with women's rights organizations to discuss Title IX of the Higher Education Amendments Act of 1972,[511] as well as with disability rights organizations to discuss the Americans with Disabilities Act.[512]

CORS is planning to enhance its outreach and education activities on Title VI. It has recommended that, in order to implement an effective civil rights program, CORS convene periodic conferences and meetings for Federal agencies and public interest and civil rights groups. These conferences would serve "to provide policy guidance, technical assistance and training as well as solicit input from interested groups and agencies."[513]

In recognition of the importance of liaison with community groups, CRD plans to send a letter to approximately 40 civil rights advocacy groups and

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[503] CORS preliminary draft recommendations, no. 4.

[504] King letter, attachment, answer no. 6, p. 9.

[505] *See* ibid., answer no. 9, pp. 9–10. These were: the NAACP, the National Urban League, the National Council of LaRaza, the National Bar Association, the Japanese American Citizen's League, the Hispanic National Bar Association, and the Minority Consumer Expo. Ibid.

[506] Ibid., p. 10.

[507] Patrick letter, p. 6.

[508] Ibid.

[509] Ibid., p. 4.

[510] Ibid.

[511] 20 U.S.C. §§ 1681–1688 (1988).

[512] Oneglia interview, p. 9.

[513] CORS preliminary draft recommendations, no. 5.

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public interest groups requesting information on federally assisted programs that may have Title VI compliance problems.[514] CORS would use this information to target agencies for onsite surveys and to select DOJ-funded law enforcement agencies for postaward compliance reviews under a memorandum of understanding with DOJ's Office of Justice Programs.[515] Although this initial contact is an essential step in improving CORS' liaison activities, it will be important for CORS to maintain contact with these interest groups on a regular basis.

## Technical Assistance

Another important function of CORS is to provide on a regular basis technical assistance to Federal agencies responsible for enforcing Title VI.[516] In the words of Margay Williams, a senior CORS coordinator, for CORS "to fulfill its coordination role effectively, [it] should be the conduit for communicating to the executive agencies the policies established by DOJ."[517]

In its 1981 plan for implementing Executive Order 12,250, CORS indicated that technical assistance was a major element of a comprehensive civil rights coordination program.[518] The plan outlined the section's interpretation of Title VI technical assistance to the agencies:

> Technical assistance is the assistance provided agencies. . . to develop and improve their civil rights enforcement programs. T/A is initiated in one of two ways: (a) at the request of the agency, or (b) as a result of routine monitoring. . . . Examples of appropriate T/A include: (a) evaluate and make recommendations regarding agencies' compliance handbooks, civil rights guidelines and policy directives, (b) assist in development of agencies' annual plans, budget documents, and information systems, and c) review and comment on agency regulations.
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> Additionally, the Section, upon request and as resources permit, will provide agencies with legal opinions on issues which cannot be resolved at the agencies' Offices of General Counsel and with policy interpretations on selected issues of general applicability. The Section will also initiate legal advice to the various Federal agencies on crosscutting issues arising under Title VI, Title IX, Section 504, or program-specific nondiscrimination statutes.[519]

CORS has provided technical assistance to agencies concerning Title VI only upon request or on an intermittent basis.[520]

CORS has provided technical assistance to agencies in other areas of civil rights. For example, in 1984, CORS provided agencies with "practical information to assist them in effectively and efficiently implementing Section 504." CORS developed a series of "Technical Assistance Guides," concise statements of technical information on disability-related issues, which were distributed to the Federal agencies.[521] More recently, CORS' technical assistance has focused on the Americans with Disabilities Act. A CORS coordinator said that CORS has provided technical assistance to agencies' civil rights staff on a variety of statutes such as the Americans with Disabilities Act, section 504, and Title IX. He explained that the

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[514] Patrick letter, p. 6.

[515] Ibid.

[516] *See* CORS Implementation Plan, p. 4.

[517] Williams interview, p. 3.

[518] CORS Implementation Plan, p. 4.

[519] Ibid.

[520] DOJ Survey, Qs. 48–53, pp. 22–23.

[521] U.S. Department of Justice, Civil Rights Division, "Justice Provides Technical Assistance Guides," *Civil Rights Forum*, vol. 7, no. 2 (Spring 1984), p. 10.

Americans with Disabilities Act became the "top civil rights priority" in recent years, and its enforcement has been at the expense of other civil rights statutes, particularly Title VI. He said that CORS "receives a number of telephone calls" from citizens regarding the Americans with Disabilities Act, as well as requests for technical assistance from the Federal agencies concerning the Americans with Disabilities Act.[522]

Several CORS staff members found CORS' technical assistance under Title VI inadequate when compared to its activities under the Americans with Disabilities Act. The CORS Deputy Section Chief (Legal) stated that other Federal agencies "just don't see Justice issuing policy and technical assistance letters under Title VI as they do under the [Americans with Disabilities Act]."[523] Another staff member stated that CORS provides higher quality services to the agencies on issues related to the Americans with Disabilities Act than on Title VI issues.[524]

In addition to providing technical assistance on the Americans with Disabilities Act to the Federal agencies, DOJ provides grant money to fund technical assistance programs for employers, builders, law enforcement officers, and other entities required to comply with the Americans with Disabilities Act. Since 1991, DOJ has awarded $8.2 million to more than 30 nonprofit organizations under the ADA Technical Assistance Grant Program.[525] DOJ recently awarded 10 grants worth $1.6 million to provide education and technical assistance to foster voluntary compliance with the Americans with Disabilities Act.[526] Nonprofit organizations use the grants to produce educational videotape materials; to train mediators in resolving ADA complaints; to incorporate universal design concepts into architecture, interior design, industrial design, and landscape architecture schools; and to expand materials used to train police officers on the rights of people with physical or mental disabilities.[527] By providing grant funds for education and technical assistance, DOJ is able, proactively, to secure voluntary compliance with the Americans with Disabilities Act and reduce the likelihood of future violations of the act.

In its preliminary draft recommendations to the new Assistant Attorney General for Civil Rights, the only recommendation for reviving CORS' Title VI technical assistance programs is that CRD "convene periodic conferences and meetings for Federal agencies . . . to provide policy guidance, technical assistance, and training."[528] However, for a truly effective technical assistance program, CORS needs to do far more for Title VI than simply to organize conferences and seminars.

To improve assistance and coordination for the Federal agencies under CRD's reorganization, CORS staff were each assigned agencies for which they serve as liaison.[529] CORS staff contacted the agencies to explain DOJ's plans to strengthen Title VI and Executive Order 12,250, and to provide assistance to the agencies. According to the Assistant Attorney General for Civil Rights, agencies asked for training, manuals, and answers to specific legal questions. As guidance is developed, CORS intends to disseminate the information to agencies either by letter or in the newly reinstituted *Civil Rights Forum* newsletter.[530]

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[522] Purvis interview, p. 2.

[523] Friedlander interview, p. 7.

[524] Williams interview, p. 5.

[525] *Justice Awards 10 Grants to Increase ADA Awareness*, Fair Empl. Rep. 178 (Nov. 18, 1994).

[526] Ibid.

[527] Ibid.

[528] CORS preliminary draft recommendations, no. 4.

[529] Patrick letter, p. 4.

## Training for Federal Agency Staff

Another major part of CORS' coordination role is to provide agencies with adequate training in civil rights programs and enforcement.[531] In its 1981 plan for implementing Executive Order 12,250, CORS elaborated on its training role and responsibilities:

> The Section may assist agencies in developing "core" training programs dealing with various aspects of civil rights enforcement. The Section will maintain an inventory of training materials developed and used by agencies so that effective training materials can be adapted by other agencies to their specific needs. . . .[T]he Section will ensure that agencies provide consistent quality training for their staff. The Section will emphasize training which provides Federal civil rights compliance staff with enhanced technical skills. . . .[532]

After Executive Order 12,250, the role of the coordinator was expanded to include, among other things, 1) responding to questions raised by assigned agencies; 2) providing technical assistance; 3) serving as "resource persons"; and 4) evaluating programs of the Federal agencies.[533] Furthermore, some of the position descriptions of CORS staff specifically state that the incumbents are expected to provide training. For example, the Deputy Section Chief is expected to participate in and develop training conferences for Federal agencies to facilitate consistency among civil rights programs.[534]

However, DOJ's response to the Commission's survey indicates that CORS has conducted few training programs. CORS has conducted only "seminars" on Title VI history and agency responsibilities under Title VI, and provided information on Title VI litigation.[535] A CORS attorney referred to an attempt by the Department of Housing and Urban Development to institute a civil rights training academy as an indication that there had been "a vacuum in the area of coordination left by CORS."[536] She stated that CORS had not recently offered any direct Title VI training to the Federal agencies.[537] The existing civil rights training, like CORS' other activities, tends to center on the Americans with Disabilities Act and section 504. An investigator explained that most agencies now request training on the Americans with Disabilities Act and section 504.[538]

According to a former coordinator who is now an investigator, between 1978 and 1979, DOJ was very involved in training agencies. After the Executive order, DOJ, for example, conducted training sessions on the use of OMB's form A-11. According to this same former coordinator, "many agencies asked for training in those days." She could not remember any significant Title VI training after 1979. She said that "it just stopped."[539]

Another CORS staff member explained that in the early 1980s, he coordinated training sessions for DOJ staff and staff at the other Federal agencies. The format of the training sessions included an overview of DOJ's role in civil rights law generally, as well as specific issues relating to Title VI and Title IX. However, for the last 10 years, he has not conducted any Title VI training sessions.[540] Another staff person said she conducted her last agency training in 1989, when she taught a class at the Tennessee Valley Authority at its request.[541]

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[530] Ibid.

[531] CORS Implementation Plan, p. 5.

[532] Ibid.

[533] O'Brien interview, p. 2.

[534] U.S. Department of Justice, Civil Rights Division, Coordination and Review Section, Deputy Section Chief Job Description (1982), p. 2.

[535] DOJ Survey, Qs. 48 and 49, pp. 22–23.

[536] Kaltenborn interview, p. 3.

[537] Williams interview, p. 2.

[538] Moore-Davis interview, p. 4.

[539] Ibid.

CORS' staff explained that, in their view, CORS needs to resume Title VI training for Federal agency staff. The Deputy Section Chief (Legal), stated that CORS should conduct Title VI training sessions with the agencies similar to the program conducted at the USDA in 1987, which consisted of discussing and describing the relevant case law and interpretations.[542] She said that CORS staff also should offer assistance and training to the agencies on Title VI issues as they have done on environmental justice issues.[543]

One of the staff attorneys also agreed that CORS needs to conduct training for the funding agencies, particularly the smaller agencies that do not have Title VI expertise. He believes that CORS should be a "reservoir" for direct coordination and information for the Federal agencies.[544] Another staff member added that DOJ staff needs to disseminate information and provide technical assistance and training to the public as well as the agencies.[545] Training and technical assistance are necessary because the Federal agencies' staff have been out of touch with Title VI issues for several years.[546] DOJ should make training of agencies' civil rights personnel a "priority" program.[547]

Despite the vigorous staff support for increased DOJ involvement in providing Title VI training, CORS' only related draft recommendation for the new Assistant Attorney General for Civil Rights calls for conferences that would serve a variety of purposes, including training, technical assistance, and public outreach.[548] Although this suggestion represents an improvement over CORS' current Title VI support activities, the recommendation indicates that CORS has failed to recognize a significant distinction among these equally important assistance functions. CORS has not conducted the type of intensive training necessary to prepare Federal agency staff for the complexities of Title VI compliance and enforcement.

In 1995, to remedy this problem and in response to requests from agencies, CORS developed a "very basic" Title VI training program.[549] CORS presented this training program to the Department of Agriculture in February 1995, and to the National Aeronautics and Space Administration in March 1995.[550] CORS tailored the training to each agency by using hypothetical fact patterns related to their specific programs.[551] In addition,

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[540] Waters interview, p. 3.

[541] Sheppard interview, p. 3.

[542] Friedlander interview, pp. 5, 12.

[543] Ibid., p. 12.

[544] Stewart interview, p. 3.

[545] Moore-Davis interview, p. 2.

[546] Waters interview, p. 3.

[547] Ibid.

[548] CORS preliminary draft recommendations.

[549] Patrick letter, p. 6.

[550] Ibid.

[551] Ibid. CORS is also discussing the possibility of training programs for the General Services Administration and the Department of Health and Human Services. Ibid.

CORS staff will be participating in the joint DOJ–Environmental Protection Agency Title VI and Environmental Justice training programs scheduled for May 15–16, 1995.[552]

## Network and Clearinghouse for the Agencies

As part of its mandate to ensure consistent and effective enforcement of Title VI, CRD intended CORS to serve as a clearinghouse and resource bank for all Federal agencies administering federally assisted programs. Because of the number and variety of Federal financial assistance programs, it is crucial for CORS to serve as a central repository for information and assistance. According to CORS' 1981 "Implementation Plan for Executive Order 12,250," the Agency Liaison Unit was designed to provide,

> (1) an established point of interaction between CORS and those Federal agencies administering programs covered by Executive Order 12,250, with an emphasis on the development and implementation of consistent policies and procedures;
> (2) a central repository of detailed information on the organization, operations, management, staffing, and productivity of each agency;
> (3) a technical assistance and clearinghouse capability to encourage the sharing and adoption of more cost-effective methods to satisfy the legal and regulatory requirements of civil rights statutes;. . .[553]

To accomplish this goal, CORS stated that its first major objective was to maintain continuing interaction with all Executive agencies covered by Executive Order 12,250.[554]

This interaction can take a variety of forms. Until 1985 the *Civil Rights Forum* served as a resource document for the Federal agencies as well as the general public. Included in the *Forum* were "congressional boxscores" briefly describing current legislation that affected civil rights.[555] The "congressional boxscore" exposed the agencies to legislation outside their own program areas that either affected their own programs or served as an example of how issues were addressed in other programs. Similarly, the *Forum* analyzed recent court cases that affected civil rights enforcement.[556] In addition to simply describing cases, CORS provided a brief analysis of the effects of the court decisions on civil rights enforcement.

DOJ's 1989–1992 Report to the President on Executive Order 12,250 stated that in September 1990, CORS established an electronic bulletin board for the Americans with Disabilities Act and other civil rights information. The bulletin board was set up as an alternate means of providing information on the section's mission and responsibilities, general civil rights enforcement information, regulations, and answers to frequently asked questions.[557] The bulletin board soon became overwhelmed with requests for electronic files and responses to inquiries on the Americans with Disabilities Act, and the resource information for the Americans with Disabilities Act became the bulletin board's "most popular feature."[558] In the next year, CORS had planned to expand the bulletin board to include Title VI and other civil rights statutes; however, the report stated that the "absence of agency regulations and other material in electronic form" could impede their inclusion within the system.[559] Although the Americans with Disabilities Act is a relatively new civil rights law, nearly all the section's printed Americans with Disabilities Act material is available electronically.[560]

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[552] Ibid.

[553] CORS Implementation Plan, pp. 7–8.

[554] Ibid., p. 11.

[555] *See, e.g.*, U.S. Department of Justice, Civil Rights Division, "Congressional Boxscore," *Civil Rights Forum*, vol. 6, no. 1 (Fall 1982), p. 2.

[556] *See*, e.g., U.S. Department of Justice, Civil Rights Division, "Supreme Court Decisions," *Civil Rights Forum*, vol. 6, no. 1 (Fall 1982), p. 6.

[557] U.S. Department of Justice, *Report on Executive Order 12,250, October. 1, 1989—September 30, 1992*, p. 59.

Currently, there is no Federal resource center or clearinghouse for Title VI information or materials. Some of the CORS staff view themselves as a human clearinghouse of information for the assigned agencies.[561] For example, one of the coordinators views his "oversight" role as being a "resource" of information for agencies covered under Title VI, offering legal opinions, regulations, and guidelines relative to Title VI.[562] Another staff member believes that CORS should disseminate information to and coordinate Title VI activities with the Executive agencies.[563] In addition, CORS should be aware of all Title VI activities throughout the Federal Government.[564]

Another coordinator stated that coordinators should review agencies' policies, documents, and manuals; meet with assigned staff; and respond to all inquiries relative to Title VI or any other civil rights issue.[565] She stated that when agencies contact her, they usually want information on such issues as complaints, compliance reviews, and general procedures.[566] Another coordinator said that he would like to see CORS become a "reservoir" for direct coordination and information for the Executive agencies.[567]

One of the CORS investigators would like to expand the "clearinghouse" idea beyond providing information for the Federal agencies.[568] He would include educating the public about Title VI, by publicizing Title VI through such mechanisms as press releases in a way that is similar to the information and education available for the Americans with Disabilities Act.[569]

To improve CORS' status as a Title VI resource center, CORS has developed a computerized Title VI directory that contains information on statutes, regulations, case law, law reviews, and other related materials.[570] In addition, the Assistant Attorney General for Civil Rights stated that CORS has begun exploring the use of an electronic bulletin board to disseminate Title VI information to the Federal agencies and the general public.[571]

## The Civil Rights Forum

In the past, one way CORS provided information to Federal agencies, as well as information to the public, on matters relating to Executive Order 12,250 was the publication of the *Civil Rights Forum*. The *Civil Rights Forum* (formerly the *Title VI Forum*) was a DOJ newsletter published several times a year. The *Forum* sought "to foster consistent and effective enforcement of [Title VI and the other statutes covered under Executive Order 12,250], to maintain continuing communication with Federal agencies covered by the Order, and to promote a broader exchange of information and expertise among agencies."[572] It included analyses of the Office of Management Budget's form A–11, notices and agendas of conferences and other civil rights issues and activities, civil rights responsibilities, programs and progress of the different agencies, litigation updates, and other civil rights initiatives.[573]

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[558] Ibid., p. 59.

[559] Ibid.

[560] Ibid., p. 60.

[561] O'Brien interview, p. 2.

[562] Talian interview, p. 2.

[563] Williams interview, p. 3.

[564] Ibid.

[565] Brown interview, p. 2.

[566] Ibid.

[567] Stewart interview, p. 3.

[568] Waters interview, p. 2.

[569] Ibid.

[570] Patrick letter, p. 7.

[571] Ibid.

CORS staff stated that the *Civil Rights Forum* was an extremely valuable method for communicating with the Federal agencies on Title VI issues.[574] Moreover, the *Forum* generally was considered an excellent source of information for the agencies.[575] The *Forum* also served a vital public information role.[576] The *Forum* originally was published exclusively for the benefit of the covered agencies, but the readership grew to approximately 1,300 Federal, State and local agencies nationwide.[577] According to the Deputy Section Chief (Program Compliance), there is no other Federal newsletter for communicating Title VI to the general public.[578]

According to the former Section Chief of CORS, DOJ decided to discontinue the *Civil Rights Forum* publication for budgetary reasons. The decision was made by DOJ over the objections of both CRD and CORS.[579]

CORS supported reinstituting the *Civil Rights Forum* because it is an "effective vehicle" for providing continuous guidance to the agencies.[580] The Deputy Section Chief (Program Compliance) explained that CORS could justify the cost of republishing the *Civil Rights Forum* based on the information it provided and the size of its former readership.[581] In preliminary draft recommendations for the new Assistant Attorney General for Civil Rights, CORS wrote:

> The [Civil Rights] Division should reinstitute the *Civil Rights Forum*. The *Forum* was a periodic publication that was developed, published and distributed by the Coordination and Review Section to over thirteen hundred subscribers. The *Forum* was the Department's direct link to the civil rights staff of federal agencies, civil rights organizations and recipients of federal financial assistance. The *Forum* carried articles which spotlighted specific agency civil rights programs,

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[572] U.S. Department of Justice, Civil Rights Division, "A Reintroduction," *Civil Rights Forum*, vol. 6, no. 1 (Fall 1982), p. 1.

[573] Nickens interview, p. 4.

[574] *See* Oneglia interview, p. 5; Nickens interview, p. 4; Payne interview, p. 4; O'Brien interview, p. 2.

[575] Oneglia interview, p. 5.

[576] Nickens interview, p. 4.

[577] Ibid.

[578] Ibid., p. 5.

[579] Oneglia interview, p. 5.

[580] Ibid.

[581] Nickens interview, p. 5. *See also* Payne interview, p. 4.

shared innovative ways of solving common problems in civil rights enforcement, provided agencies with up to date developments and information concerning civil rights cases, regulations, law and pending legislation.[582]

In 1995, CORS resumed publication of the *Civil Rights Forum*.[583] CORS' mailing list includes more than 3,000 organizations, including Federal, State, and local agencies, civil rights organizations, and other public interest groups.[584]

## The Interagency Coordinating Council

The Interagency Coordinating Council, composed of representatives of eight agencies having responsibilities for section 504 of the Rehabilitation Act of 1973, was established in 1978 to coordinate enforcement of the provisions of that title.[585] Under Executive Order 12,250, the Attorney General is the chair of the Interagency Coordinating Council.[586] The Attorney General has delegated her function as chair to the Assistant Attorney General for Civil Rights.[587] The members of the Council are representatives from the Equal Employment Opportunity Commission, the Department of Labor, the Architectural and Transportation Barriers Compliance Board, the Department of Education, the Department of Health and Human Services, and the Office of Personnel Management, as well as the Assistant Attorney General for Civil Rights.[588]

After a hiatus in meetings following the issuance of Executive Order 12,250, the Interagency Coordinating Council met several times in 1984. Under its mandate, the Council planned to meet monthly to discuss civil rights issues relative to persons with disabilities.[589] The Council continued to meet frequently throughout the 1980s and early 1990s to address issues related to Title VI and the Americans with Disabilities Act.[590]

For instance, during fiscal years 1990–1991, the Council focused its attention on the Americans with Disabilities Act, and agencies briefed the Council on their Americans with Disabilities Act implementation activities pertaining to regulatory development, technical assistance, and enforcement.[591] In 1992 the Council approved for dissemination to more than 90 Federal executive agencies its revised policy statement, which is designed to assist agencies in understanding their responsibilities under the Americans with

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[582] CORS preliminary draft recommendations, no. 6.

[583] Patrick letter, p. 7.

[584] Ibid.

[585] U.S. Department of Justice, *Report on Executive Order 12,250, October 1, 1989—September 30, 1992*, pp. 52–53.

[586] Exec. Order No. 12,250, § 1–201, 3 C.F.R. 298 (1981) *reprinted in* 42 U.S.C. § 2000d-1 (1988).

[587] U.S. Department of Justice, *Report on Executive Order 12,250, October 1, 1989—September 30, 1992*, p. 53.

[588] U.S. Department of Justice, Civil Rights Division, "Interagency Coordinating Council Reconvened," *Civil Rights Forum*, vol. 7, no. 2 (Spring 1984), p. 11.

[589] Ibid.

[590] *See* U.S. Department of Justice, Civil Rights Division, *Report on Executive Order 12,250, October 1, 1982—September 30, 1984*, pp. 48–53; U.S. Department of Justice, Civil Rights Division, *Report on Executive Order, 12,250, October 1, 1984—September 30, 1985*, pp. 54–58; U.S. Department of Justice, Civil Rights Division, *Report on Executive Order 12,250, October 1, 1985—September 30, 1986*, pp. 62–68; U.S. Department of Justice, Civil Rights Division, *Report on Executive Order 12,250, October 1, 1986—September 30, 1987*, pp. 53–56; U.S. Department of Justice, Civil Rights Division, Coordination and Review Section, *Report on Executive Order 12,250, October 1, 1987—September 30*, 1988, pp. 22–23; U.S. Department of Justice, *Report on Executive Order 12,250, October 1, 1989—September 30, 1982*, pp. 52–54.

[591] U.S. Department of Justice, *Report on Executive Order 12,250, October 1, 1989—September 30, 1992*, pp. 52–53.

Disabilities Act to make Government documents and audiovisual materials available.[592]

The CORS staff recommends that CRD should either expand the Interagency Coordinating Council to include other civil rights statutes[593] or create a separate council organized to address issues relative to Title VI.[594] The Director of Program Compliance stated that Executive Order 12,250 provides sufficient authority for this type of effective governmentwide civil rights coordination. Therefore, CRD must provide strong top-down support for the vigorous exercise of CORS' interagency coordination authority.[595]

If a separate Title VI council is impractical, the Deputy Section Chief (Legal) would at least like to see CORS staff meet monthly with civil rights staff from various agencies such as the Department of Labor and the Department of Education to discuss Title VI issues.[596] There should be a series of interagency meetings and conferences designed to bring people together from the various agencies with the objective of increasing knowledge and sharing Title VI information.[597]

Thus, DOJ's coordination and liaison activities fail to meet the needs of a coordinated Federal Title VI enforcement effort. DOJ offers only limited technical assistance and training to the Federal agencies on Title VI. It conducts virtually no outreach and education on the statute and, until 1993, had not held meetings with civil rights organizations to discuss their concerns or seek their advice on Title VI coordination and enforcement activities. In the mid-1980s DOJ ceased publishing the *Civil Rights Forum*, which was a valuable source of Title VI information for Federal agencies, civil rights organizations, and the general public. DOJ has taken some steps to improve its Title VI coordination and liaison function in 1995, including resuming publication of the *Forum*.

## Strengthening Title VI: Priorities, Policies, and New Initiatives

CRD and CORS officials and staff have discussed a number of initiatives that they considered essential to strengthening Title VI enforcement. These initiatives included:

- Policy development and dissemination to the agencies;[598]

The former Section Chief of CORS indicated that she would like CORS to issue a series of policy directives similar to the Equal Employment Opportunity Commission's management directives. The policy directives would address discrete issues, such as attorneys' fees under Title VI or the use of the disparate impact standard. CORS also should address issues such as alternative procedures for resolving complaints and complaint processing time limits.[599] The Deputy Section Chief (Legal) also suggested that one policy statement should address the evidence necessary to prove a violation of Title VI.[600]

A major new policy development initiative in which DOJ is already participating is the development of a Federal environmental justice policy under Executive Order 12,898, entitled

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[592] Ibid., p. 54.

[593] Payne interview, p. 4.

[594] King interview, p. 3.

[595] Payne interview, p. 4.

[596] Friedlander interview, p. 7.

[597] King interview, p. 3.

[598] Oneglia interview, p. 4; Friedlander interview, p. 3.

[599] Oneglia interview, p. 4.

[600] Friedlander interview, p. 3.

"Federal Actions to Address Environmental Justice to Minority Populations and LowIncome Populations."[601] DOJ is engaged in developing the administration's environmental equity policy. According to DOJ, CRD "has provided extensive advice to the White House Office on Environmental Policy, the Environmental Protection Agency, and DOJ's Environment and Natural Resources Division" on environmental justice issues.[602] CORS staff have consulted with the Environmental Protection Agency on enforcing environmental justice issues under Title VI and are participating in the Interagency Working Group on environmental justice. In addition, CORS has detailed an attorney to the Environmental Protection Agency to assist that agency in its Title VI/Environmental Justice enforcement program.[603]

In 1995, CORS staff has been working with the Environmental Protection Agency and other DOJ staff to develop the agenda for the joint EPA–DOJ Environmental Justice conference.[604] The Environmental Protection Agency also has requested that CORS research several legal issues relating to the application of Title VI to environmental justice issues.[605]

- Development of a model Title VI regulation;[606]

The Deputy Section Chief (Legal) recommended that DOJ follow the same process for Title VI as it used in 1984 for section 504 of the Rehabilitation Act of 1973. For section 504, CORS sent a model prototype regulation to all of the agencies, obtained agency comments, and then published a DOJ regulation incorporating all the changes. Subsequently, CORS reviewed each agency's proposed regulation, which was drafted based on the DOJ prototype.[607]

- Publication of a Title VI manual;[608]

- Encourage Federal agencies to send their regulations, guidelines, policies, and manuals to DOJ for review;[609]

- Reinstitution of onsite agency reviews and interagency surveys;[610]

The former Section Chief of CORS stated that CORS should exercise its authority under Executive Order 12,250 to conduct audits of the Federal agencies. Onsite audits are necessary to ensure effective and consistent enforcement of the civil rights statutes and to address any policy questions the agencies have concerning Title VI.[611]

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[601] Exec. Order No. 12,898, 30 Weekly Comp. Pres. Doc. 276 (Feb. 14, 1994). *See* King letter, attachment, answer no. 4, pp. 4–5.

[602] Ibid., p. 4.

[603] Ibid., p. 5.

[604] Patrick letter, p. 7.

[605] Ibid.

[606] Oneglia interview, p. 4; Friedlander interview, p. 4.

[607] Friedlander interview, p. 4.

[608] Oneglia interview, p. 4.

[609] Friedlander interview, p. 5.

[610] Oneglia interview, p. 4; Nickens interview, p. 6; Brown interview, p. 3.

[611] Oneglia interview, p. 4.

- Renewed publication of the *Civil Rights Forum*;[612]

The former Section Chief of CORS supported reviving the *Civil Rights Forum*, which she characterized as an excellent source of information and an effective vehicle for providing continuous guidance to the agencies.[613]

- Increased interaction between DOJ and community organizations on Title VI;[614]

- A Title VI education program;[615]

- Title VI conferences;[616]

- Provision of technical assistance directly to State and local recipients;[617]

- Revive CORS' Letters of Finding Project;[618]

- Title VI training for Federal agency staff;[619]

- Title VI meetings with officials of other Federal agencies.[620]

The former Acting Assistant Attorney General for Civil Rights indicated that he had already begun to hold biweekly meetings with the Assistant Secretary for Civil Rights of the Department of Education to discuss the coordination of their respective responsibilities under all civil rights programs, including Title VI. He stated that CRD should continue conducting regular meetings with the civil rights offices of the Federal agencies to improve their Title VI relationships.[621]

DOJ and CRD staff stressed, however, that few of these initiatives could be undertaken at the then-existing level of CORS resources.[622] According to the CORS Director of Program Compliance, to move CORS' coordination and review program in the right direction, CORS needed to return CORS Executive Order 12,250 staffing to previous levels.[623] The CORS Deputy Chief for Program Compliance recommended adding six coordinator positions to the section's Agency Liaison Unit.[624] The former Acting Assistant Attorney General for Civil Rights indicated that the plan CRD was developing for the new Assistant Attorney General for Civil Rights would include more resources for Title VI enforcement.[625]

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[612] Ibid., p. 5.

[613] Ibid.

[614] Nickens interview, p. 6; Stewart interview, p. 2.

[615] Oneglia interview, p. 4; King interview, p. 3.

[616] King interview, p. 3.

[617] Nickens interview, p. 4.

[618] Oneglia interview, p. 5; Friedlander interview, p. 5.

[619] Friedlander interview, p. 5.

[620] Turner interview, p. 4; Friedlander interview, p. 7.

[621] Turner interview, p. 4.

[622] Oneglia interview, p. 9; Friedlander interview, p. 12.

[623] Payne interview, p. 4.

[624] Nickens interview, p. 6.

[625] Turner interview, p. 2.

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Several CORS staff members indicated that, at a minimum, CORS could not fulfill its responsibilities related to the Americans with Disabilities Act of 1990[626] with its existing staff.[627] For instance, CORS had five permanent investigators and two temporary investigators assigned to investigate more than 1,000 complaints related to the act. As a result, CORS investigators were handling 100 complaints each, whereas in most other agencies, investigators are assigned 10–13 complaints each.[628] Several coordinators added that CORS could not undertake onsite reviews without an increase in its travel budget.[629] CORS Attorney Louis Stewart said that CORS was "grossly understaffed" for the number of Americans with Disabilities Act complaints it had to process. He contrasted CORS' 8 "inexperienced" investigators with the 415 experienced investigators who work at the Department of Education.[630]

Staff also suggested that CORS and CRD would need to be restructured, with most of CORS' Americans with Disabilities Act responsibilities shifted out of the section, probably to the Public Access Section.[631] Gerald Jones, the former Acting Deputy Assistant Attorney General for Civil Rights, stated that DOJ needed either to increase CORS' resources or to restructure CRD by giving the Public Access Section all of CORS' responsibilities related to the Americans with Disabilities Act (but without reducing CORS' resources).[632] The former Acting Assistant Attorney General for Civil Rights recommended reexamining the entire structure of CRD, not just the structure of CORS.[633]

CRD and CORS officials and staff maintained that, in addition to increasing the resources for Title VI enforcement and restructuring CORS, a "reinvigoration" of DOJ's Title VI coordination and enforcement program would require "top down" leadership stressing the high priority the administration places on Title VI.[634] The former Section Chief of CORS and several other staff members recommended that DOJ issue a high-level statement, preferably from the President or the Attorney General, calling for more vigorous Title VI enforcement throughout the Federal Government.[635] A high-level statement would improve the effectiveness and efficiency of DOJ's coordination and review of the agencies' Title VI enforcement efforts.[636] The CORS Deputy Section Chief (Legal) indicated that CORS has already begun working on a Title VI recommitment statement and expressed her hope that the statement would be issued at a high-level ceremony celebrating the 30th anniversary of Title VI.[637]

The Director of Program Compliance summed up the views of CORS staff on what it would take to strengthen DOJ's Title VI coordination and enforcement program. He said, "[a] major reinvigoration of Title VI will require a firm, continuing commitment and concrete expression of support, including financial and personnel resources, from top DOJ management if it is to succeed."[638]

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[626] 42 U.S.C. §§ 12,101–12,213 (Supp. V 1993).

[627] Oneglia interview, p. 9; Friedlander interview, p. 12.

[628] Oneglia interview, p. 9.

[629] Nickens interview, p. 6; Williams interview, p. 5.

[630] Stewart interview, p. 5.

[631] Turner interview, p. 8; Jones interview, p. 3.

[632] Jones interview, p. 3.

[633] Turner interview, p. 8.

[634] *See* Brown interview, p. 3; Moore-Davis interview, p. 2.

[635] Oneglia interview, p. 3; Friedlander interview, p. 3; Williams interview, p. 4; Nickens interview, pp. 4, 6; Payne interview, p. 3.

[636] Oneglia interview, p. 3.

[637] Friedlander interview, p. 3.

As of April 28, 1995, all but two of the specific initiatives listed above were under development at DOJ.[639] The Assistant Attorney General for Civil Rights indicated that the Letters of Finding project will be considered if CORS receives more resources, and revisions to the model Title VI regulations are suspended because of the National Performance Review.[640]

In 1995, DOJ restructured the Civil Rights Division in part to strengthen Title VI and Executive Order 12,250.[641] DOJ renamed the Public Access Section the Disability Rights Section and transferred 10 positions from CORS to the new section.[642] Although this reorganization relieves CORS of its responsibilities under the Americans with Disabilities Act, it leaves CORS without the necessary resources to fulfill its responsibilities under Executive Order 12,250, particularly coordinating and overseeing the Federal Title VI enforcement effort.

Rather than increasing the resources devoted to Title VI coordination and enforcement, DOJ reduced the size of CORS by one-third. This reduction in staff leaves CORS without the staff necessary to conduct an effective Title VI coordination and enforcement program. Thus, despite DOJ's plans to make Title VI enforcement a high priority, the reality is that DOJ has reduced both the stature and the resources of the chief Federal Title VI civil rights enforcement office.

In addition to removing responsibility for disability-related statutes and reducing CORS staff, the Assistant Attorney General for Civil Rights has assigned CORS to assist DOJ's program offices with their own Title VI implementation, compliance, and enforcement responsibilities.[643] Because DOJ does not have a civil rights office to oversee its own compliance with civil rights laws, each DOJ program office, until 1995, has been tasked to enforce civil rights laws within their own programs.

To improve DOJ's Title VI enforcement activities in its own programs, CORS and the Office of Justice Programs, the largest DOJ funding agency, have developed a memorandum of understanding.[644] Under the memorandum, CORS will be responsible for conducting postaward compliance reviews and investigating complaints of discrimination in services funded by the Office of Justice Programs. The Office of Justice Programs will retain its responsibilities for employment discrimination, cases involving discrimination based on disability, and preaward compliance reviews. As part of its new responsibilities, CORS plans to initiate the first Title VI postaward compliance review since the 1970s involving police department services.[645] The Assistant Attorney General for Civil Rights has asked CORS to develop similar agreements with the other DOJ funding agencies, such as the Federal Bureau of Investigation and the Immigration and Naturalization Service.[646]

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[638] Payne interview, p. 8.

[639] Patrick letter, p. 7.

[640] Ibid., p. 4, p. 7.

[641] Patrick letter, p. 2.

[642] Ibid.

[643] Deval L. Patrick, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, letter to Mary Frances Berry, Chairperson, U.S. Commission on Civil Rights, Apr. 28, 1995, p. 2 (hereafter cited as Patrick letter).

[644] Ibid.

[645] Ibid., pp. 2–3.

[646] bid., p. 3.

It is important for DOJ to designate an office to ensure compliance with civil rights laws in DOJ's own programs. However, CORS does not have the resources to conduct Title VI enforcement activities for DOJ programs. More important, even if CORS received the necessary resources, it would be difficult for CORS to retain the distance necessary to oversee and monitor enforcement activities. CORS' new responsibilities conflict directly with its mandate under Executive Order 12,250. In essence, CORS would be responsible for monitoring and overseeing its own Title VI enforcement activities. Although DOJ's intentions demonstrate a genuine interest in ensuring its own compliance with civil rights laws, DOJ programs would benefit more from the establishment of a high-level civil rights office tasked to conduct civil rights implementation, compliance, and enforcement activities for the entire agency. CORS would then be able to oversee and monitor the activities of a DOJ civil rights office in the same manner that it evaluates other Federal agencies.

Finally, DOJ will not be able to strengthen its Title VI coordination and enforcement program without sustained leadership from the President and the Attorney General to make Title VI enforcement a high priority at DOJ. This includes increasing the resources devoted to Title VI activities and issuing a new Executive order to clarify DOJ's authority to ensure that other Federal agencies are complying with and enforcing Title VI. CORS needs the resources to renew its policy development and review activities, to reinstate its interagency survey and onsite reviews of the Federal agencies, and to revive its coordination and liaison activities.

## Findings and Recommendations

### Strengthening Title VI Implementation, Compliance, and Enforcement: Emphasizing Civil Rights Priorities

**Finding:** From 1975 to 1995, the scope of the Commission's current study, the U.S. Department of Justice (DOJ) neglected Title VI enforcement. The diminished activity resulted, in part, from the lack of commitment to Title VI enforcement.[647] In addition, DOJ's priorities shifted away from Title VI and toward other civil rights statutes, particularly section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990.[648] The change in civil rights priorities was reflected in the budget and resources available for the coordination and enforcement of civil rights statutes. Although the resources devoted to DOJ's Americans with Disabilities Act responsibilities increased, the resources available for Title VI decreased significantly.[649]

In 1995 the Assistant Attorney General for Civil Rights announced DOJ's intent to strengthen Title VI and make full implementation of Executive Order 12,250 a high priority. To refocus the Coordination and Review Section (CORS) on the implementation of Executive Order 12,250, the Assistant Attorney General for Civil Rights removed all disability-related coordination and enforcement responsibilities from CORS. However, despite plans to strengthen Title VI and Executive Order 12,250, DOJ transferred CORS staff and reduced drastically the resources available for CORS' remaining coordination and enforcement activities, such as developing model enforcement regulations and policies, monitoring and providing oversight for Federal agencies' enforcement programs, and conducting liaison activities with the agencies, community groups, and the public.

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[647] See pp. 55–124.

[648] See pp. 61–62.

[649] See tables 3.1 and 3.2.

**Recommendation:** To assist DOJ in strengthening the coordination and enforcement of its Executive Order 12,250 responsibilities, the Federal Government should renew its commitment to Title VI, Title IX, and section 504 at all levels of government. Congress should conduct an oversight hearing on the enforcement of the Executive Order 12,250 statutes and should request suggestions from DOJ, Federal agency civil rights offices and federally assisted program offices, the U.S. Commission on Civil Rights, State and local recipient agencies of Federal financial assistance, and grassroots community organizations and interest groups that represent the interests of recipients and beneficiaries.

The President should issue a new Executive order clarifying DOJ's authority over the other Federal agencies. It is essential for the President to transfer explicitly his authority to enforce statutory and regulatory requirements against the Federal agencies. In addition, to improve executive oversight of Title VI enforcement, the President should provide formal comments to DOJ on its annual Executive Order 12,250 reports to the Office of Management and Budget. The President should utilize the reporting mechanism both to receive information on important civil rights policies and to communicate administrative policy to DOJ.

Moreover, the President should integrate civil rights policy into his domestic policy agenda by consulting formally with his civil rights advisors on the impact new legislation and policies will have on civil rights. To facilitate this process, the President should conduct quarterly meetings with the Attorney General and Assistant Attorney General for Civil Rights to establish and discuss the administrations's civil rights priorities. It is particularly important to include civil rights concerns in the President's domestic policy agenda for issues such as welfare reform, health care reform, farm subsidies, environmental protection, and agency downsizing under the National Performance Review, which all impact significantly on minority communities.

Furthermore, to ensure a genuine strengthening of DOJ's Title VI coordination and oversight program, the President and the Attorney General should issue a joint statement reinforcing their commitment to the enforcement of civil rights statutes. This statement should be accompanied by a corresponding expression of financial support for civil rights enforcement in each subsequent budget cycle, including detailed analyses of the impact that other civil rights responsibilities have on CORS' enforcement of Title VI and Title IX.

Although CRD correctly separated disability-related civil rights responsibilities from CORS' nondisability-related duties, CRD should recognize both areas as high priorities for DOJ by providing sufficient resources and staff for these responsibilities. To demonstrate its commitment to strengthening Title VI, DOJ should increase CORS' staff and resources to reflect its anticipated increase in activity.

## DOJ's Authority Under Executive Order 12,250

**Finding:** Executive Order 12,250 creates a unique relationship among the President, DOJ, and the Federal agencies. Under the order, the President delegated to the Attorney General all of his responsibility to monitor and oversee the Federal agencies under Title VI, Title IX, and section 504. This leadership role includes enforcement authority to conduct onsite audits and program evaluations of Federal funding agencies, and to ensure that the agencies comply with DOJ's directives. Thus, the order gives DOJ considerable authority to ensure effective and consistent civil rights enforcement by the Federal agencies through aggressive oversight and monitoring, and proactive technical and legal assistance and policy implementation.

Despite DOJ's mandatory leadership role, Title VI enforcement has dwindled considerably in the last 20 years in part because of DOJ's reluctance to assert its authority over the other Federal agencies. Today, DOJ's Title VI enforcement continues to suffer because DOJ exercises no enforcement authority over the other Federal agencies, contrary to DOJ's mandate to utilize the

President's authority under Title VI.[650] DOJ's own interpretation of the scope of its authority unnecessarily restricts DOJ's ability to perform its coordination and oversight responsibilities effectively.[651]

The Department of Justice does not coordinate and provide leadership for Title VI enforcement effectively as required by Title VI and Executive Order 12,250. Consequently, DOJ has often been reluctant to conduct onsite program reviews of the Federal agencies or to take a proactive stance ensuring effective Title VI enforcement, opting instead only to respond to questions raised by the agencies. This passive approach makes it difficult for DOJ to find and correct deficiencies in the Title VI enforcement activities of the Federal agencies.

In addition, DOJ has not clarified the scope and limitations of its authority under Executive Order 12,250 for its own staff. In particular, CORS staff members do not agree on the scope of their authority to compel agencies to comply with DOJ's directives in the event that an agency or agencies do not agree with DOJ's position.[652] Furthermore, DOJ officials and staff generally have agreed that DOJ's responsibilities are limited to "oversight and coordination" of the Federal Title VI enforcement effort. They do not view the Department as having an enforcement role of its own under Executive Order 12,250.[653]

**Recommendation:** The President and the Attorney General first should issue a statement recommitting DOJ to implementing its leadership, coordination, and oversight responsibilities to ensure that all Federal agencies are enforcing Title VI effectively and consistently. DOJ should explain that its current authority to impose requirements on the agencies under Executive Order 12,250 and to compel compliance with those requirements is equivalent to the President's authority over the Federal agencies.

The President should consider issuing a new Executive order clarifying the extent of DOJ's authority over other Federal agencies. The revised Executive order should give DOJ the ability to ensure effective and consistent Federal Title VI enforcement. The Executive order should create a direct, formal reporting line from DOJ to the President so that, in the event that an agency disagrees with a directive from DOJ, the President may be able to intervene to settle the dispute. Moreover, to assist the President in settling disputes among the 27 Federal agencies with financial assistance programs and between Federal agencies and DOJ, the new Executive order should create an Interagency Council on Civil Rights. The council should consist of members representing the President's domestic policy advisors, DOJ, and other Federal agencies determined by the President. In the event that there is a major dispute at the Federal administrative level over civil rights policy, the council should settle the dispute on behalf of the President in accordance with Federal law. This will help to ensure that civil rights laws are enforced consistently and effectively.

DOJ should issue a policy statement or guidance to clarify the reach of its current authority or any future changes in its authority that may result from an amended Title VI statute or revised executive order. The statement or guidance should define DOJ's proactive implementation, compliance, and enforcement activities, including its specific oversight and monitoring duties. The statement or guidance also should explain DOJ's specific expectations for the Federal funding agencies and State and local government recipients of continuing program funds or block grants. This statement or guidance should clarify the scope of DOJ's authority definitively for the benefit of DOJ staff, Federal funding agencies, State and local government recipients, categorical grant applicants and recipients, potential and actual beneficiaries, and the general public.

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[650] *See* pp. 55–57.

[651] *See* pp. 55–57.

[652] *See* p. 56.

[653] *See* p. 55.

## Pattern or Practice Authority

**Finding:** Currently, Title VI does not explicitly provide DOJ with the authority to initiate complaints against recipients demonstrating a pattern or practice of discriminatory behavior.[654] Instead, Title VI limits DOJ's authority to cases or matters referred to the Assistant Attorney General by the Federal agencies for investigation, litigation, or other appropriate enforcement action. Unlike other statutes, such as Title VII of the Civil Rights Act of 1964 and the Fair Housing Amendments Act of 1988, Title VI does not recognize the importance of providing DOJ with the authority to eliminate systemwide discriminatory practices through the exercise of pattern or practice litigation authority.[655] This is problematic because discrimination in Federal financial assistance programs often involves systemic discrimination or patterns of discriminatory behavior that are difficult to eliminate through the complaints of individuals and instead require broad-scale investigations.

Moreover, one DOJ official indicated that the referral system is insufficient because it represents an admission against interest for an agency to state that its conciliation efforts failed to remove discrimination from its own program.[656] The former Acting Attorney General for Civil Rights and senior CORS staff members support amending Title VI to give the Attorney General the authority to initiate pattern or practice actions against recipients of Federal financial assistance.[657]

Although DOJ does not have pattern or practice authority under Title VI, DOJ does have pattern or practice authority under several block grant programs covered by Title VI. However, to date, DOJ has not exercised its pattern or practice authority under any Federal block grant program.[658]

**Recommendation:** DOJ should exercise the pattern or practice authority that already exists under the block grant programs. In addition, Congress should amend Title VI to permit DOJ to initiate pattern or practice investigations and litigation against recipients of Federal financial assistance who demonstrate systemic, generalized, routine, or repeated acts of discrimination, rather than isolated or sporadic incidents of discrimination. CRD should include the initiation of pattern or practice investigations in its enforcement planning and provide the resources and training necessary for these actions. The exercise of pattern or practice authority will allow DOJ to maximize the effectiveness of its resources to vindicate the public interest at a level that may not be reached through individual complaints.

## Responsibilities and Organizational Structure of the Coordination and Review Section

### CORS' Responsibilities

**Finding:** Although the Civil Rights Division (CRD) reduced CORS' staff by one-third, the Assistant Attorney General for Civil Rights intends to transfer DOJ's own Title VI compliance and enforcement responsibilities to CORS as part of DOJ's strengthening of Title VI and Executive Order 12,250.[659] Thus, in addition to coordinating all Federal civil rights enforcement efforts, CORS' reduced staff will also be responsible for ensuring nondiscrimination by DOJ's own recipients of Federal financial assistance in programs administered by the Office of Justice Programs, the National Institute of Corrections, the Federal

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[654] *See* p. 57.

[655] *See* pp. 57–58.

[656] *See* p. 58.

[657] *See* p. 58.

[658] *See* p. 59.

[659] *See* p. 128.

Bureau of Investigation, and the Immigration and Naturalization Service. Under a memorandum of understanding with the Office of Justice Programs, CORS will be responsible for postaward compliance reviews and investigating complaints of discrimination on the basis of race, national origin, color, sex, age, and religion, while the Office of Justice Programs will conduct all preaward reviews and conduct postaward compliance reviews and complaint investigations involving disability claims and employment issues.[660] CORS anticipates signing similar agreements with other offices within DOJ.[661] Despite this increased responsibility, the Assistant Attorney General for Civil Rights has indicated only that he intends to allocate more resources to CORS "in the future." The Assistant Attorney General for Civil Rights has not provided a specific plan for allocating these additional resources.

**Recommendation:** Although the Commission commends DOJ for its interest in ensuring nondiscrimination in its own federally assisted programs, DOJ should not delegate this responsibility to CORS. Because CORS has been delegated the President's authority to coordinate and provide leadership for the Federal civil rights enforcement effort, DOJ should not place CORS in the position of also monitoring DOJ's own Title VI compliance and enforcement activities. As the leading civil rights enforcement agency, DOJ should demonstrate its commitment to civil rights laws by creating an Office of Civil Rights under the Attorney General to ensure nondiscrimination in its own programs. By creating a civil rights office separate from CRD and CORS, DOJ will be able to prevent a conflict of interest with CORS' oversight and monitoring responsibilities while also preventing DOJ's own compliance and enforcement activities from overshadowing CORS' Executive Order 12,250 leadership and coordination functions.

In the event that DOJ intends to continue to delegate its Title VI compliance and enforcement obligations to CORS, DOJ should hire an independent consultant to determine whether CORS' dual functions will create a conflict of interest. In conducting this analysis, the consultant should analyze CORS' mission, structure, responsibilities, activities and tasks, staffing, and budget to devise a structure that will allow CORS to address its responsibilities effectively and without conflict. If the consultant finds that combining CORS' functions is feasible, then DOJ and CRD should conduct a budget analysis to provide the staff and resources necessary both to coordinate the Federal civil rights enforcement effort and conduct Title VI compliance and enforcement activities for DOJ. DOJ should analyze carefully the costs of these activities and set its priorities accordingly. In addition, CRD and CORS should develop an implementation plan that ensures that CORS' Executive Order 12,250 leadership, oversight, and coordination duties will not be overwhelmed by DOJ's own Title VI compliance and enforcement activities.

To distinguish these activities, CORS should create a separate DOJ programs unit to address DOJ's compliance and enforcement of Title VI in DOJ-funded programs. The unit should function independently of the rest of CORS and should submit its regulations, reporting documents, guidelines, and policies to CORS' coordination unit for review and approval. CORS should develop internal guidelines that ensure that CORS coordinators apply the same standards to the DOJ programs unit that it applies to the Federal agencies.

### CORS' Structure

**Finding:** CORS is one of nine program sections within CRD. On March 1, 1995, CRD reorganized CORS in an effort to streamline CORS' management structure and eliminate its responsibility for disability-related issues.[662] CRD removed two layers of supervisory review from CORS' programs unit in order to streamline its management structure and reduced CORS' staff by removing

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[660] *See* p. 128–29.

[661] *See* p. 128–29.

[662] *See* p. 63.

10 full-time positions.[663] Although the streamlining of CORS management is appropriate in light of its corresponding reduction in staff, the new structure does not emphasize the importance of all aspects of Title VI leadership and coordination, including policy development, enforcement actions, monitoring and oversight, technical assistance, training, public education and outreach, and data and systems analysis.

In general, the duties currently performed by CORS' remaining staff bear little resemblance to their official position descriptions. CORS attorneys are not performing several duties detailed in their position descriptions, including assisting CRD's litigation division with Title VI litigation, working with constituent groups inside and outside of the Federal Government, and developing solutions for problems and negotiating Federal agency acceptance of the solutions. CORS coordinators currently are not performing several major responsibilities detailed in their position descriptions. These include: recommending Civil Rights Implementation Plans for approval or disapproval, conducting interagency surveys and monitoring agency implementation of recommendations based on these surveys, providing training to Federal agency staff, and participating in policy development.[664] Moreover, given that each coordinator is assigned to six or seven Federal agencies, with two of these coordinators responsible for decentralized agencies that have multiple civil rights offices, it is not feasible for the coordinators to do the jobs described in the sample position description.[665]

**Recommendation:** Regardless of CORS' internal structure, CORS should retain its position as a CRD section, and it should have a senior executive-level Section Chief with status equivalent to all other CRD Section Chiefs. This placement of CORS within CRD will help to ensure that Title VI and other Executive Order 12,250 responsibilities are given the priority within CRD that they deserve.

To improve the efficiency and quality of CORS' activities under Title VI and Executive Order 12,250, CRD should restructure and expand CORS to accommodate an improved and increased activity level. CORS should remain devoted exclusively to the coordination and enforcement of Title VI and Title IX in all federally assisted programs. By creating a section dedicated only to nondisability-related Executive Order 12,250 responsibilities, DOJ demonstrated a commitment to enforcement of these statutes and prevents other civil rights priorities from overwhelming the importance of Title VI and Title IX.

However, in order for DOJ to strengthen Title VI effectively, it should reorganize CORS to maintain Title VI leadership and coordination programs that, taken together, will advance the Federal Title VI enforcement effort. DOJ must recognize that effective Title VI enforcement requires CORS' involvement in six major areas: compliance, enforcement, and litigation support; policy and procedure development; coordination and assistance for Federal, State, and local governments; civil rights training; public education and outreach; and data and systems analysis. To conduct each of these activities effectively, DOJ should divide CORS into the following six units each devoted to specific civil rights functions and each with sufficient staff and resources to accomplish their tasks:

- *Compliance, Litigation, and Enforcement*: This unit should be responsible primarily for reviewing and assessing agency enforcement actions and referrals. This unit should review all agency letters of findings[666] and Federal funding suspension, deferral, and termination decisions[667] to ensure accurate and consistent enforcement of Title VI. This unit, rather than CRD's litigation sections, should receive all agency referrals for Title VI litigation.[668] However, the unit should seek assistance from the specific CRD program litigation section that may have expertise to contribute on issues such as public housing, education and desegregation, and employment. In addition, this unit should initiate complaints alleging a pattern or practice of discrimination under the existing provisions in some block grant statutes, and under Title VI if Congress amends the statute to include this cause of action.[669] To fulfill CORS' leadership and enforcement authority under Executive Order 12,250, this unit should work with the Federal, State, and Local Government Coordination Unit to conduct interagency surveys[670] and onsite reviews of Federal agency Title VI programs.[671]

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[663] *See* p. 63.

[664] *See* pp. 64–66.

[665] *See* p. 66.

This unit also should maintain a library of its briefs and court documents so that other agencies may use CORS' legal analysis and arguments as a reference for their own administrative actions. The unit should contain attorney-advisors, trial attorneys, appellate litigators, civil rights analysts, and equal opportunity specialists and investigators all with Title VI expertise.

- *Policy and Procedure Development*: This unit should serve as the central office for the development and dissemination of Title VI policies and procedures. This unit should develop and revise DOJ's coordination regulations, the Federal agency model regulations, and all guidelines, policies, and compliance manuals for use by Federal agencies, State and local government recipients, nongovernmental recipients, applicants, beneficiaries, and the general public. This unit should review for approval, as required by Executive Order 12,250, all agency regulations, guidelines, policies, and manuals.

In addition, this unit should work with the Planning, Analysis, and Systems Services Unit and the Federal, State, and Local Government Coordination Unit to design a new Civil Rights Enforcement Plan that should supersede and improve on the current Civil Rights Implementation Plan.[672] This unit should define the procedures and terms necessary for developing an agency Civil Rights Enforcement Plan, such as preaward reviews, postaward desk-audit reviews, compliance reviews, complaint investigations, and data collection. It is essential for this unit to consult with all other units and the Federal agencies in order to develop policies and procedures that serve the needs of Title VI compliance and enforcement practitioners.

This unit also should have primary responsibility for reviewing new legislation to assess its impact on civil rights.[673] The unit should review not only legislation directly involving civil rights, but also provisions creating or affecting Federal financial assistance programs or the scope of Federal agency authority and procedures, such as welfare reform, health care reform, agency downsizing under the National Performance Review, and regulatory flexibility provisions. This unit should be staffed primarily with attorney-advisors, civil rights analysts, and equal opportunity specialists.

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[666] For a further discussion of the letters of finding project, *see* pp. 152–53.

[667] For a further discussion of fund termination reviews, *see* p. 156.

[668] For a further discussion of DOJ's Title VI litigation, *see* p. 154.

[669] For a further discussion of pattern or practice authority, *see* p. 132.

[670] For a further discussion of interagency surveys, *see* p. 152.

[671] For a further discussion of onsite reviews of Federal agencies, *see* p. 152.

[672] For a further discussion of Civil Rights Enforcement Plans, *see* p. 150.

[673] For a further discussion of CORS' role in reviewing proposed legislation, *see* pp. 155–56.

- *Federal, State, and Local Government Coordination*: This unit should serve as a link between DOJ and the Federal agency civil rights offices, and between the Federal agency civil rights offices and their agency's program offices.[674] This unit should be responsible for coordinating the implementation, compliance, and enforcement activities of the Federal agencies and State and local government recipients operating continuing programs or block grant programs on behalf of subrecipients. The unit's primary responsibilities should include the following: reviewing Civil Rights Enforcement Plans for approval or disapproval by the Section Chief;[675] facilitating and monitoring delegation agreements between agencies and between agencies and their subrecipients;[676] providing technical assistance on request from Government agencies and recipients; providing technical assistance proactively when the unit identifies deficiencies in an agency's plan or program;[677] serving as a central clearinghouse for Federal, State, and local government initiatives and programs;[678] and working with agency program offices to facilitate and improve the collection of assurances from State and local government recipients. To fulfill CORS' leadership and enforcement authority under Executive Order 12,250, this unit should work with the Compliance, Litigation, and Enforcement Unit to conduct interagency surveys and onsite reviews of Federal agency Title VI programs.

This unit also should maintain a reference library and clearinghouse of Federal agency strategic plans, policies, guidelines, and manuals to share with other agencies interested in developing their own materials. In addition, this unit should assist the other CORS units by providing information on agency practices and the practical application of CORS' regulations, policies, training programs, and public education and outreach activities. The unit's staff should consist of attorney-advisors, civil rights analysts, and equal opportunity specialists, each assigned to specific agencies in order to develop expertise in the programs and operations of those agencies.

- *Civil Rights Training Center*: DOJ should take the lead in creating a civil rights training center. The training center should conduct training in all civil rights issues for Federal, State, and local government agencies and judicial offices, universities, private industry firms and businesses, members of the legal community, community organizations and interest groups, and the general public. The center should develop programs and materials to train individuals in a variety of issues and areas, such as the relationship between federally assisted programs and civil rights laws, grant application procedures, implementation and compliance procedures, and the development of methods of administration. The center should seek guidance from the other CORS units in order to target its training programs to address identified deficiencies.

The training center also should provide grants to organizations that conduct civil rights training in their areas of expertise, such as elementary and secondary education, higher education, job training programs, health and welfare services, public housing, and environmental justice. This will allow the training center to provide its participants with program-specific training presentations and materials. This unit's staff should be comprised of attorney-advisors, civil rights analysts, equal opportunity specialists, training specialists, and one employee development specialist to design programs for Federal employees that will assist their career development.

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[674] For a further discussion of interagency coordination, *see* p. 158.

[675] For a further discussion of reviewing Civil Rights Enforcement Plans, *see* pp. 150–51.

[676] For a further discussion of CORS' role with respect to delegation agreements, *see* p. 153.

[677] For a further discussion of proactive technical assistance, *see* p. 157.

[678] For a further discussion of CORS' role as a network and clearinghouse, *see* p. 158.

- *Public Education and Outreach*: This unit should develop, manage, and evaluate comprehensive public education and outreach programs to ensure public awareness and understanding of civil rights laws and policies. The unit should also establish and maintain relationships with organizations and associations concerned with civil rights by utilizing a variety of techniques and strategies to ensure an effective and mutually rewarding relationship with DOJ's stakeholders and customers. For example, the unit should participate in meetings and conferences, conduct onsite visits, and prepare and distribute brochures, pamphlets, handbooks, and exhibits. As the primary liaison between DOJ and its constituency, this unit should identify existing and emerging issues that are of concern to the community and communicate these issues to the other CORS units. The unit should prepare materials on a variety of topics, including procedures for filing complaints under Title VI, the relationship between Title VI and Title VII complaints in federally assisted programs, and the impact of health care reform on civil rights. In addition, the unit should produce the *Civil Rights Forum* on behalf of CRD with suggestions, articles, and materials from the other units and the Federal agencies.[679] This unit should be staffed primarily with civil rights analysts, equal opportunity specialists, community relations officers, and writer-editors.
- *Planning, Analysis, and Systems Services*: This service should be responsible for CORS' operational planning, budget submissions, development of fiscal year goals and objectives, and evaluation of CORS' efficiency and effectiveness at meeting these goals. It should also develop and maintain an information database containing data on the disposition of complaints and each agency's compliance and enforcement activities. This database should be accessible to all agencies for use in their compliance and enforcement activities. For example, agencies should use the database in the preaward process to determine if another agency has found deficiencies in an applicant's program or operations. This unit should be staffed primarily with equal opportunity specialists, civil rights analysts, budget analysts, systems analysts, program analysts, and statisticians.

CORS should staff each unit with personnel demonstrating expertise in Title VI and external civil rights enforcement, and should provide first-line supervisors for each unit who report to the Deputy Section Chiefs. This new structure would demonstrate the importance of all aspects of DOJ's Executive Order 12,250 responsibilities by establishing units and resources dedicated to each function. However, if CRD chooses to retain CORS' current structure and provide the staff increases necessary to address its responsibilities, CRD should analyze whether an increase in staff will require the addition of first-line supervisors who would report to the Deputy Section Chiefs.

Once the structure and responsibilities of CORS are finalized, CORS should revise the position descriptions for each staff position. CORS should develop position descriptions that reflect accurately the specific duties and performance standards for each staff position. Accurate position descriptions are essential for hiring and evaluating the performance of each employee based on official, established criteria and for assessing CORS' staff as a whole for purposes of enforcement, management, and budget planning.

## Budget, Staffing, and Workload of the Coordination and Review Section

### Civil Rights Division Budget Process

**Finding:** CRD's current budget is based on traditional line-item budgeting, which tends to perpetuate the same activities from year to year. This type of budget practice begins with a base determined by past levels of expenditures and concentrates on projected increases or decreases from that base and historical budget data. This procedure often leads to an examination of only a small portion of CORS' overall budget requirements. This traditional approach is based on the assumption that every function currently performed is effective and essential. It provides an institutionalized framework for perpetuating past priorities and commitments. However, to fulfill CORS' mission, the budget process must be flexible to accommodate new initiatives and additional priorities and responsibilities. For example, CORS has spent a significant portion of its budget over a 10-year period completing reviews of agency regulations. As the need for this activity diminishes, CORS' budget and enforcement planning for the following budget cycle might indicate that CORS should direct its resources towards increasing its training programs instead of reviewing regulations.

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[679] For a further discussion of the *Civil Rights Forum*, *see* p. 158.

In addition, CRD's budget process does not ensure that CORS receives adequate resources to conduct its specific Title VI coordination and oversight activities. First, the budget process requires CRD to rank its civil rights programs in order of importance. In addition, the administration sets the priorities for DOJ's civil rights agenda. Thus, if the administration does not designate Title VI enforcement as a priority civil rights program, then CORS may not receive adequate resources to implement its mandatory duties. Because Title VI has not been a priority at DOJ, the budget and staff resources for Title VI activities have suffered. Moreover, CORS neither submits a specific budget request nor divides its budget allocation among the civil rights statutes for which it is responsible and activities specific to enforcing those statutes. As such, it is even more difficult to ascertain the appropriation of resources needed to conduct specific Title VI coordination and oversight activities.[680]

**Recommendation:** DOJ should alter its budget process to ensure that each of CRD's sections is allocated sufficient resources to implement its mandatory responsibilities as well as the Attorney General's initiatives and priorities. CRD's budget should be based on accountability to its mission and should be analyzed in terms of current critical priorities. In addition, the budget should be based on agreed-upon requirements, expectations, and results.

To ensure that resources are allocated to new concerns and priorities, each Section Chief should justify specifically the purpose of each new function, program, or project under his or her supervision. The Section Chief also should delineate the section's anticipated results and achievements. Each program or activity within the fiscal year's planning should be defined in terms of the objectives to be achieved through government spending, the best method to achieve these objectives, minimizing the costs required by the program, and maximizing the benefits and anticipated outcomes.

Specifically, the Section Chief should analyze specific projects and activities based on mandatory or statutory requirements, new initiatives, constituent concerns, and low priority activities and programs, and establish a program cost analysis. The program cost analysis must include the section's identified mission and goals, and provide specific and measurable objectives. The following information should be included in the program cost analysis to be submitted in the section's budget decision package:

- objectives to be pursued;
- measures of effectiveness and efficiency;
- alternative courses of action and reasons for the selected course of action;
- risks, costs, services, and participation of multiple departments, divisions, and sections;
- cost benefits if objectives are achieved;
- consequences if objectives are not pursued or if existing activities are eliminated or not funded adequately;
- projected cost in resources and staff workyears;
- milestones and timeframes for meeting objectives; and
- a method to evaluate the section's performance and effectiveness, and provide for accountability.

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[680] *See* pp. 66–68.

DOJ should develop a team of budget analysts and program staff from each Division. Each section's budget decision package should be forwarded to the Division's budget team to approve or disapprove the package for inclusion in the Division's final budget submission. The budget decision packages should be aggregated by each program cost analysis and ranked in value and benefit to the overall missions and goals of DOJ. The budget team should review the program cost analysis and consider the various levels of costs and the benefits to be achieved in order to make the best budget decision.

CRD should use each program cost analysis for controlling and forecasting costs, and as a measure of productivity. In addition, the program cost analysis should be used to institute changes and ensure flexibility in the event that unanticipated events require additional expenditures. The program cost analysis also serves as documentation for evaluation and accountability for each section's results and expenditures. CRD should use the program cost analysis to coordinate the activities of each section and maximize the efficiency of the Division.

This type of budget planning provides the Assistant Attorney General for Civil Rights with the means and accountability to influence directly and effectively the numerous decisions and priorities that must be made while also providing each section with the opportunity to defend its program needs.

### Budget and Staff Resources

**Finding:** When President Carter signed Executive Order 12,250 on November 2, 1980, the administration planned to augment substantially the size of CORS. At that time, the Office of Management and Budget approved 57 full-time permanent positions (FTPs) to conduct CORS' Executive Order 12,250 activities. However, the additional FTPs were never allocated.[681] On the contrary, between 1981 and 1993, the number of FTPs devoted to Executive Order 12,250 decreased from 46 to 11. Staff devoted specifically to Title VI also declined, from 15 to 4 FTPs.[682]

Although the Civil Rights Division (CRD) does not have sufficient resources for any of its programs, over the past 20 years, Title VI has suffered proportionally more than any other program.[683] The result is that DOJ's Title VI responsibilities are implemented by what one senior DOJ official has described as a "skeleton" staff.[684]

The Clinton administration has yet to take any substantial steps to increase the funding for DOJ's Title VI leadership and coordination program. Rather than increasing the resources devoted to Title VI coordination and enforcement, DOJ has reduced the size of CORS' staff by one-third. Although CORS' disability-related responsibilities transferred to the Disability Rights Section along with 10 of CORS' former staff, this reduction leaves CORS without the staff necessary to conduct an effective and comprehensive Title VI coordination and enforcement program. In addition, DOJ intends to increase CORS' workload by designating CORS to conduct compliance reviews and complaint investigations in DOJ's own federally assisted programs. Thus, despite DOJ's promise to make Title VI enforcement a high priority, DOJ reduced both the stature and the resources of the chief Federal Title VI civil rights enforcement office.[685]

**Recommendation:** DOJ should devote sufficient resources to its nondisability-related functions under Executive Order 12,250 in order for CORS to perform its responsibilities effectively. Although DOJ correctly removed responsibility for all disability-related statutes from CORS, DOJ should reconsider its corresponding reduction in CORS' staff resources. Over the next 5 years, DOJ should return CORS to its intended 1980 staffing level, which was established based on DOJ's own budget analysis, unless DOJ can demonstrate, through a new civil rights budget study, that a CORS staff increase is unnecessary.

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[681] *See* p. 68.

[682] *See* p. 70; *see* table 3.2.

[683] *See* p. 71.

[684] *See* p. 71.

[685] *See* p. 128.

In light of its commitment to improving its Title VI program, DOJ should conduct a longitudinal civil rights budget impact study to determine the effects of CORS' new structure and staffing levels. The study should evaluate projected costs and benefits over the next 5 years to determine whether CORS will be able to maintain an efficient and effective civil rights program. In addition, the study should demonstrate that CORS' new responsibility for ensuring nondiscrimination in DOJ-funded programs will not deplete the resources available for CORS' leadership and coordination responsibilities under Executive Order 12,250. To ensure an effective Title VI coordination and enforcement program, DOJ should commit to providing sufficient resources for CORS to fulfill its responsibilities.

### Work Plans and Management Plans

**Finding:** CORS does not produce a formal work plan, and CRD does not prepare a formal management plan allocating resources for specific civil rights responsibilities and objectives.[686] Consequently, resources are shifted among different responsibilities within CORS and among CRD sections without formal accountability to statutory obligations. For example, until 1995, CORS' resources were spent primarily on investigating complaints filed under the Americans with Disabilities Act without consideration of the consequences this resource depletion had on CORS' Title VI obligations.

**Recommendation:** CRD and its sections should create a formal planning process that details the activities of each section and their relationship to the mission and goals of the Division. First, each section, including CORS should prepare a section work plan. The work plan should begin with the section's mission and its goals and objectives for the fiscal year. The work plan should describe the tasks necessary to achieve these goals and objectives and the titles and position of the staff needed to perform these tasks. The section should then rank its tasks by importance, beginning with mandatory duties, initiatives designed to fulfill the mission of the section, and issues raised by the section's constituents.

Each section should submit its work plan to CRD for review. CRD should analyze the section work plans as a whole to determine whether each section's tasks and activities serves the mission of the Division. It is important for CRD to examine how each section's individual mission, goals, and objectives impact on the other sections and CRD's mission. In creating its management plan, CRD should rank each section's goals and objectives in relationship to the mission of the Division with a focus on anticipated outcome, not on the costs of the activities. Once the CRD management plan and the section work plans are finalized, they should be reviewed as part of the Division's budget process.

CRD should submit its management plan to DOJ for review. DOJ should incorporate the management plans for each Division in the development of a long-term strategic plan for the Department. DOJ should review the management plans to determine whether each Division's goals and objectives will help DOJ fulfill its strategic plan. To ensure that civil rights enforcement is incorporated into DOJ's strategic plan, it is critical for the Assistant Attorney General for Civil Rights to participate in the strategic planning process so that civil rights priorities are not diminished by DOJ's other important responsibilities, such as criminal law enforcement.

After DOJ approves and alters the Division management plans, DOJ should return the plans to each Division. Each Division must either adjust its management plans in accordance with DOJ's directives or justify why the adjustments are not feasible. The Division must demonstrate that a failure to conduct the activities in its management plan will have a detrimental effect on the mission, goals and objectives of its sections, the division as a whole, and DOJ.

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[686] *See* pp. 71–72.

A formal planning process at all levels of DOJ management is important to Title VI enforcement. Without a detailed work plan and management plan with specific goals and objectives, Title VI activities and priorities may be eclipsed by other DOJ priorities in both the strategic planning of the Department and in the budget process.

## Implementation Activities: Development of Standard Title VI Policies and Procedures

Executive Order 12,250 gives the Attorney General a "leadership" role "for the consistent and effective implementation" of Title VI and other Federal civil rights statutes. This role includes developing and reviewing agencies' regulations, guidelines, and policies. Furthermore, Executive Order 12,250 directs the Attorney General to establish, through guidelines and regulations, governmentwide standards and procedures, including in the following specific areas: enforcement actions, investigations, compliance reviews, recordkeeping and reporting requirements, and employee training. CORS has effectively abandoned this role since the 1970s.[687]

DOJ has failed to provide the leadership necessary to fulfill its responsibilities. DOJ has not instituted governmentwide procedures and standards that reflect the changing needs of civil rights enforcement. In particular, DOJ has not addressed the changes in Federal funding mechanisms that have altered the nature of Federal financial assistance. Instead, DOJ has relied on policies and procedures that are more consistent with Federal programs of the 1960s and 1970s that placed primary responsibility for program operations with Federal agencies. DOJ has not established policies and procedures designed specifically for the increasing reliance on State-administered block grant programs. Because the Federal Government is removed from the direct operation of major federally assisted programs, it is essential for DOJ to clarify the civil rights responsibilities of State and local government recipients.

### DOJ's Coordination Regulations

**Finding:** DOJ's coordination regulations do not address DOJ's responsibilities in overseeing the Title VI enforcement efforts of the Federal agencies. For example, they do not provide procedures for monitoring the Federal agencies, nor do they specify the agencies' obligations to cooperate with DOJ's monitoring efforts. Because DOJ has not revised its coordination regulations since 1981, the regulations do not reflect the changes in Title VI enforcement such as the increasing reliance on State and local governments to ensure that their subrecipients comply with Title VI.[688] Furthermore, the coordination regulations neither standardize the procedures necessary to conduct an effective Title VI implementation, compliance, and enforcement program, nor acknowledge that the agencies do not agree on Title VI procedures or terminology. For example, some agencies do not distinguish postaward desk-audits from compliance reviews.

**Recommendation:** DOJ should revise its coordination regulations to clarify DOJ's leadership, oversight, and coordination responsibilities in the following areas:

1) development of standard Title VI policies, procedures, and terminology;
2) establishment of criteria and procedures for DOJ's oversight and monitoring of the Federal agencies' Title VI enforcement efforts;
3) clarification of the scope of DOJ's authority to compel agencies to comply with DOJ policies and directives; and
4) coordination and liaison with the Federal agencies, State and local government recipients, nongovernmental recipients, actual and intended beneficiaries, and the general public.

Specifically, DOJ should develop procedures for monitoring the civil rights enforcement efforts of the Federal agencies through onsite evaluations and interagency surveys. In addition, DOJ should use the coordination regulations to clarify the purpose and contents of Civil Rights Enforcement Plans and provide specific procedures for CORS' review of these agency planning documents. To ensure consistency in Title VI enforcement, DOJ also should develop policies and guidelines on issues that affect all federally assisted programs, such as the increasing use of block grant funding.

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[687] *See* p. 72.

[688] *See* p. 74.

### Model Regulations

**Finding:** DOJ has not issued model Title VI regulations to the Federal agencies since the late 1960s when it promulgated the regulations of the U.S. Department of Health, Education, and Welfare as model regulations.[689] Most Federal agencies have not updated their regulations since that time, and none has updated its regulations within the past 10 years. As a result the regulations of the Federal agencies do not address contemporary issues and changing laws and policies. In particular:

- The Federal agencies' Title VI regulations do not contain the precise definition of "program or activity" created by the Civil Rights Restoration Act of 1987 as it applies to Title VI coverage and fund termination.
- The agencies have not updated their regulations to reflect the increasing use of block grants to distribute Federal program funds to State and local government recipients.
- Generally, the agencies' Title VI regulations do not include specific examples of the application of compliance and enforcement procedures in current agency programs.
- The regulations do not have adequate data collection and reporting requirements for recipients.
- The agencies have not updated the appendices to their regulations to list the agencies' current federally assisted programs covered by Title VI.

As of April 1995, DOJ had suspended development of a model regulation because of the National Performance Review's examination of all agency regulations.

**Recommendation:** In support of the National Performance Review, DOJ should review all Federal agency regulations and assess whether they continue to meet the needs of Title VI enforcement. DOJ should assist the National Performance Review by developing a model regulation that corrects deficiencies in the current agency regulations and provides consistent regulatory procedures. A new model regulation would streamline the regulatory review process and allow agencies to adopt the model with minimal adjustment to their own programs.

DOJ should issue model Title VI regulations that address the following issues:

- the amended definition of "program or activity" resulting from the Civil Rights Restoration Act;
- specific requirements and procedures for block grant programs;
- enhanced data collection and reporting requirements for Federal agencies.

In disseminating the model Title VI regulations to the agencies, DOJ should emphasize that the agencies should demonstrate the application of each procedure to specific agency programs. DOJ should require the agencies either to include program-specific examples in their regulations or issue formal guidelines to accomplish that purpose. In addition, DOJ should enforce the provision requiring agencies to include an updated list of their programs covered by Title VI either in the model regulations or through an alternative publication that is readily accessible to the general public.

### Title VI Manual

**Finding:** DOJ has never disseminated to the Federal agencies in a comprehensive manner its interpretation of Title VI and its view of the necessary elements of an effective Title VI enforcement program. In the early 1980s, DOJ began preparing a comprehensive Title VI manual that was never issued. The manual would have provided the Federal agencies with indepth information on Title VI, including analyses of major legal issues and detailed enforcement procedures. Most Federal agencies indicated that such a manual would improve their Title VI enforcement efforts immeasurably. In 1995, CORS has begun to develop a Title VI manual that will include legal history, case precedents, and practical applications of procedures to particular facts.

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[689] *See* p. 75.

**Recommendation:** DOJ should issue a comprehensive Title VI manual detailing its interpretation of Title VI and its views of the necessary elements of an effective Title VI enforcement program. This manual should be disseminated to all Federal agencies responsible for enforcing Title VI. The manual should provide specific procedures for conducting complaint investigations and compliance reviews, examples of the types of data agencies should collect on their recipients and beneficiaries and how to use the information to identify deficiencies, and instructions for developing civil rights budget justifications and enforcement planning documents.

## DOJ's Policy Positions

### Civil Rights Restoration Act

**Finding:** After the enactment of the Civil Rights Restoration Act of 1987, DOJ sent a letter to all Federal agencies encouraging them to revise their Title VI regulations to reflect the precise definition of "program or activity" included in the act's amendment to Title VI.[690] However, DOJ has neither drafted new language for model Title VI regulations nor issued guidelines on the impact of the Civil Rights Restoration Act on the coverage of Title VI or its termination remedy. In the spring 1995 *Civil Rights Forum*, DOJ indicated that each agency's original Title VI regulations reflect the broad interpretation of coverage that was restored by the act. However, none of the agency Title VI regulations contains the precise definition of "program or activity" or an explanation of its application to Title VI coverage or fund termination. To date, none of the Federal agencies has altered its regulations to reflect the clarifications in Title VI provided by the Civil Rights Restoration Act. Moreover, DOJ has not reviewed the agency regulations to ensure that they contain the necessary regulatory, policy, or guideline changes.[691]

**Recommendation:** In recognition of the confusion created by the decision in *Grove City* and the enactment of the Civil Rights Restoration Act, DOJ should require agencies to revise their regulations and provide guidelines for applying the definition of program or activity to Title VI coverage and fund termination. To assist the agencies, DOJ should issue a comprehensive model regulation that includes the amended and clarified definition of "program or activity" with respect to Title VI coverage. DOJ should also develop guidelines with examples of covered programs and activities to clarify the scope of Title VI. Moreover, DOJ should require agencies to develop guidelines that apply the scope of Title VI coverage to their federally assisted programs.

In addition, DOJ should codify the standards for fund termination that have developed through court interpretations and agency practices. DOJ should state in the model regulations that agencies may terminate funds under two conditions. First, an agency may terminate or suspend funds if discrimination is found in the program or activity receiving Federal financial assistance, otherwise known as the "pinpointing theory." Second, an agency may suspend or terminate funds if the federally assisted program is affected by discrimination elsewhere in the recipient's operations, otherwise known as the "infection theory." DOJ should issue guidelines interpreting both theories, explaining the courts' interpretations of these theories and providing examples of the types of discrimination that may "infect" a federally assisted program. To clarify the application of these theories, DOJ should require agencies to provide guidelines applying these theories to program-specific fact patterns. The guidelines also should include program-specific examples of recipient discriminatory practices or operations that "infect" federally assisted programs.

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[690] *See* p. 76.

[691] *See* p. 76.

### Employment Discrimination

**Finding:** DOJ's coordination regulations specify that Federal agencies have jurisdiction over employment discrimination under Title VI if 1) the purpose of a Federal assistance program is to provide employment or 2) the employment discrimination causes discrimination against beneficiaries of the federally assisted program, regardless of the program's purpose.

In 1983, DOJ issued procedures that require Federal agencies to refer complaints of employment discrimination against recipients of Federal financial assistance to the Equal Employment Opportunity Commission, except when the complaints also allege other forms of discrimination by the recipient. The agencies are required to handle, on their own, complaints that involve allegations of both employment discrimination and discrimination in other practices of the recipient.

**Recommendation:** To facilitate the referral of employment discrimination complaints, DOJ should require each agency to sign a memorandum of understanding with the Equal Employment Opportunity Commission or publish joint rules that detail the procedures for referral. In addition, DOJ should assist agencies in producing guidelines that provide examples of Title VI-covered employment discrimination that affects beneficiaries in specific programs. Moreover, DOJ should develop materials for training, education, and outreach that explain to potential complainants their right to file a claim of employment discrimination under both Title VI and Title VII.

### Application of Title VI to Block Grants

**Finding:** Although the Federal Government distributes funds increasingly through State continuing programs and block grant programs, DOJ has never issued guidance to the Federal agencies on applying compliance and enforcement procedures to these programs. In 1982, DOJ indicated that it would work with the Federal agencies "to develop regulations that are consistent with both the block grant approach and civil rights requirements." However, DOJ never developed these regulations. In addition, the Federal agencies have neither adjusted their current Title VI enforcement procedures nor created new procedures to reflect the increasing reliance on State-administered federally assisted programs.[692] DOJ has failed to define clearly the roles and obligations of both Federal agencies and State recipients in the implementation, compliance, and enforcement of Title VI. In April 1995, the Assistant Attorney General for Civil Rights stated that CORS intends to study block grant programs and hold discussions with the Federal agencies on the application of Title VI enforcement in these programs.

**Recommendation:** DOJ should acknowledge the expanding role of State government agencies in the administration of federally assisted programs and develop regulations, procedures, policies, and guidelines designed specifically for State continuing programs and block grant programs. In particular, DOJ should recognize that certain procedures, such as preaward reviews, must be modified to accommodate continuing State programs and State-administered block grants. DOJ should design model assurances and methods of administration specifically for States operating continuing programs or block grant funds.

DOJ also should recognize that block grant programs and other State continuing programs require the Federal agencies to assume responsibility for monitoring the State agencies to the same extent that DOJ is required to oversee and monitor the Federal agencies. For this reason, DOJ should require the Federal agencies to report on the compliance and enforcement activities of their State recipients and track the Federal funds as they are redistributed to subrecipients. DOJ should require Federal agencies to conduct more than a cursory review of assurance forms and other documents submitted by State recipients. To assist Federal agencies in modifying their procedures to accommodate the increasing reliance on State recipients, DOJ should provide training to Federal agencies on their expanding oversight and monitoring responsibilities.

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[692] *See* p. 77–78.

## Federal Agency Civil Rights Staffing, Organizational Structure, and Training

### Federal Agency Civil Rights Staffing

**Finding:** DOJ's coordination regulations specify merely that "[s]ufficient personnel be assigned by a Federal agency to its Title VI compliance program to ensure effective enforcement of Title VI." However, DOJ does not provide formal guidance on the number and qualifications of Title VI enforcement staff needed for effective enforcement. For instance, DOJ does not require that these staff be full-time, fully trained civil rights compliance officers.[693]

**Recommendation:** DOJ should issue formal guidance on Title VI staffing to the Federal agencies. The guidance should clarify not only that agencies should have sufficient personnel, but that the personnel should be fully trained civil rights specialists and that, except for very small agencies, they should work full time in external civil rights enforcement. In particular, they should not divide their time between external and internal civil rights matters, nor should they be given Title VI enforcement responsibilities as a collateral duty.

### Federal Agency Organization

**Finding:** DOJ does not provide adequate guidance on the organizational structure of Federal agencies' civil rights enforcement programs. Guidance is given only on an informal basis, such as in a checklist published in the *Civil Rights Forum*, or on an intermittent basis, such as in a letter from the Acting Attorney General for Civil Rights to the Director of Civil Rights of the U.S. Department of Transportation. In these informal formats, DOJ has stated that each agency should have a central civil rights office with authority over the agency's programs and that in agencies where civil rights staff are in field offices, the central civil rights office should have authority over regional and field staff.[694] DOJ has also indicated that when internal equal employment opportunity functions are combined with external civil rights enforcement functions, the external functions are often overwhelmed by the internal employment issues.

**Recommendation:** DOJ's position on Federal agencies' organizational structure for Title VI enforcement should be issued in the form of guidelines for the Federal agencies. These guidelines should clarify that:

- Federal agencies should have a central civil rights office with authority over all agency personnel engaged in Title VI enforcement;
- All regional and field office civil rights specialists should report to that civil rights office, rather than to regional directors or administrators;
- The civil rights office should have a separate unit devoted to external civil rights enforcement.

DOJ should also recommend that civil rights offices shouldF be removed from the Secretary by no more than two layers of review. The placement of civil rights offices within the agency is critical to the office's ability to participate in the agency's strategic planning and to ensure that civil rights priorities are incorporated into the agency's overall mission.

## Setting Standards for Agency Procedures

### Standards for Preaward Reviews

**Finding:** DOJ's coordination regulations do not provide specific procedures for conducting preaward reviews of applicants and recipients. Moreover, DOJ has failed to develop guidelines to assist agencies in adopting preaward procedures that recognize the different needs of each type of major grant program categories, such as categorical grants, block grants, and continuing or renewable grants. In addition, DOJ has not adjusted its regulations or guidelines to address the impact of declining resources on each agency's ability to conduct comprehensive preaward reviews.

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[693] *See* p. 80.

[694] *See* p. 80–81.

More important, DOJ has not adequately resolved the increasing tension between two important goals of Title VI enforcement. Title VI compliance and enforcement depends on the delicate balance between ensuring Title VI compliance before releasing Federal funds and assuring that Federal programs reach their intended beneficiaries in a timely and effective manner.

**Recommendation:** To meet the challenges of declining resources and changing funding mechanisms, DOJ should adopt new preaward requirements and provide specific guidelines for Federal agencies and primary State and local government recipients. DOJ should establish a set of basic procedures that will apply to applicants and recipients of all types of Federal grants. DOJ should also design preaward guidelines that apply specifically to recipients of block grants, formula grants, and continuing grants for both governmental and nongovernmental recipients. In addition, DOJ should develop procedures that apply primarily to individual, corporate, and private organization recipients of categorical grants.

Recognizing the difficulty in conducting comprehensive preaward reviews for all recipients, DOJ should design, at a minimum, a model assurance form that will require applicants and recipients to demonstrate that their programs are in compliance with Title VI as a condition for receiving Federal funds. The model assurance form should serve as a minimum requirement to which each agency may add additional program-specific assurance requirements. At a minimum, the form should clearly state that the assurance is provided as a condition for the receipt of Federal funds, that the applicant or recipient agrees to maintain records and submit reports on its programs, and that the applicant or recipient will require all subrecipients, subcontractors, or subgrantees to comply with Title VI.

The model assurance form should include a checklist that lists the actions prohibited under Title VI.[695] Each applicant and recipient should be required to state that it does not engage in any of the prohibited activities. In addition, each applicant and recipient should be required to provide information on judicial or administrative findings of discrimination against their programs and on consent decrees or voluntary compliance agreements that are monitored by an agency. Each applicant and recipient also should be required to provide information on any pending compliance reviews or complaint investigations conducted by the funding agency or any other agency, including the Department of Justice, the Office of Federal Contract Compliance Programs, and the Equal Employment Opportunity Commission. Each applicant and recipient should be required to submit an equal employment opportunity plan with their assurance form. This will allow the agency to determine whether the applicant or recipient establishes sufficient procedures to prevent discrimination and remedy any prior findings of discrimination. Finally, the model assurance form should also contain a provision that states that failure to provide the required information is a violation of the assurance and may result in suspension or termination of funding.

In addition to collecting a more comprehensive assurance form from applicants and recipients, DOJ should require all Federal agencies to contact DOJ, the Office of Federal Contract Compliance Programs, the Equal Employment Opportunity Commission, and any other agency with which it has a delegation agreement or memorandum of understanding under Title VI to ensure that there are no compliance reviews or complaint investigations pending against the applicant or recipient. DOJ should facilitate this contact by maintaining a comprehensive database of all agency compliance reviews and complaints.

DOJ should distinguish its standards for preaward review procedures based on the type of funding provided by each agency. In recognition of the increasing reliance on block grant formula funding and the large number of continuing program grants, DOJ should assist agencies in developing preaward procedures to accommodate these programs. For example, DOJ should require agencies to conduct preaward reviews on all first-time applicants and recipients of block grants, formula grants, and continuing program grants, regardless of whether the recipient is a State or local government entity or a private citizen, corporation, or organization. Thereafter, DOJ should require agencies to conduct preaward reviews of any continuing or renewing recipient program that has not been subject to an agency preaward or postaward desk-audit or onsite compliance review in the last 2 years. By setting these standards, DOJ will be able to balance the resource constraints on the funding agencies without neglecting the importance of ensuring initial compliance with Title VI.

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[695] *See* chap. 4, pp. 171–72.

Because some agencies provide categorical grants to thousands of recipients, DOJ should design preaward standards that ensure compliance with Title VI while also preventing undue delays in the release of funds to recipients. DOJ should develop guidelines that require agencies to determine, through enforcement and management planning, what percentage of applicants and recipients the agency may reasonably review in a year based on their resources and enforcement goals. Once the agency establishes this percentage, the agency should develop a formula to set a funding threshold to select recipients for preaward reviews. For example, if an agency determines that it is feasible to conduct preaward reviews for only 5 percent of its program recipients, the agency should rank its recipients by a variety of factors, including the size of the grants received and whether the program involves building a permanent structure with Federal funds. Thus, for example, if the top 5 percent of recipients receive over $1 million or use the funds to build permanent structures or facilities, the agency should conduct preaward reviews on all recipients who meet these criteria. It is essential for agencies to revisit their formulas regularly as part of their budgeting and planning process, in order to maximize the benefits of the preaward review process. By establishing these standards, DOJ will be able to ensure that agencies do not release funds to noncomplying recipients while also preventing unnecessary delays that may otherwise affect detrimentally the ultimate program beneficiaries.

### Standards for Postaward Reviews

**Finding:** Although the coordination regulations require Federal agencies to implement "effective program[s] of post approval reviews," the regulations do not offer sufficient guidance on the nature of an effective postapproval review program. In particular, they do not distinguish between desk-audit and onsite reviews; they do not explain the process by which an agency should choose a particular type of review; they do not specify what types of information each review should include; and, they do not require that reviews be conducted by the civil rights office; in fact, they encourage the agencies to include a Title VI component in their general program reviews.[696]

**Recommendation:** The regulations should give more guidance on postaward reviews. Postaward desk-audit reviews should: 1) identify deficiencies in recipients' delivery of program services to potential and actual participants and beneficiaries of all races and ethnicities; 2) investigate allegations of discriminatory barriers to participation or disparate treatment in participation; 3) evaluate recipients' public education and program accessibility; and 4) identify recipients' needs for technical assistance or further onsite reviews. The regulations should distinguish between desk-audit reviews and onsite compliance reviews. DOJ also should develop desk-audit procedures for continuing State programs and block grants that will assist the agencies in tracing the Federal funds from primary recipients to their subrecipients. Moreover, DOJ should specify that all civil rights reviews should be conducted by fully-trained equal opportunity specialists, rather than by program personnel.

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[696] *See* p. 83.

### Standards for Sanctions

**Finding:** DOJ's coordination regulations direct agencies to initiate "appropriate enforcement procedures" against recipients who have been found in noncompliance and who do not enter into compliance voluntarily. DOJ's guidelines specify courses of action a Federal agency may take when it cannot achieve compliance voluntarily. Because the threat of fund termination often compels recipients to comply voluntarily, the ultimate sanction is rarely used.

DOJ policy in this area is insufficient to ensure that Federal agencies are aware of all the potential sanctions available under Title VI, such as temporary suspension of funds, conditions on continued funding, damages and attorney fees, termination of funding, and referral to DOJ.

The Federal agencies have interpreted too narrowly their options for sanctioning recipients under Title VI. Agencies often limit their options to full termination of funds or referral to DOJ for litigation. Furthermore, agencies often fail to monitor their voluntary compliance agreements to ensure that recipients continue to correct the agreed-upon deficiencies. DOJ is neither providing active leadership to convey to the agencies the variety of alternative resolution mechanisms at their disposal nor encouraging the agencies to be aggressive in using those methods.

**Recommendation:** DOJ should require agencies to develop mechanisms to monitor voluntary compliance agreements and ensure that recipients maintain their commitment to correct their deficiencies. DOJ should require that the agencies conduct periodic reviews and offer technical assistance to assist the recipient in correcting its deficiencies.

Although DOJ should continue to encourage agencies to seek compliance voluntarily, DOJ should provide guidelines and specific examples for determining when an agency should seek full fund termination or when temporary suspension is appropriate. For example, DOJ should recommend temporary suspension when a recipient fails to correct voluntarily a technical deficiency in its assurance form, but recommend fund termination when the recipient refuses to eliminate a discriminatory barrier to full participation in its program.

To prevent noncomplying recipients from benefiting from their noncompliance, DOJ should conduct a study to determine whether it should consider establishing a monetary sanction enforcement option. The monetary sanction or fine would be remedial not punitive, and would allow an agency to recover the costs resulting from the recipient's noncompliance, such as the cost of the agency's investigation or the cost of enforcement litigation. This option would be particularly important when fund termination is inappropriate, such as when the deficiencies occur in a recipient's program that involves the completed construction of permanent structures. The threat of a remedial monetary fine or sanction may also serve to deter a recipient from using Federal funds to support a discriminatory program.

### Standards for Technical Assistance

**Finding:** Given the complexity of Title VI requirements and the increasing tendency for Federal agencies to delegate Title VI compliance responsibilities to State and local recipient agencies, the need for agencies to develop comprehensive programs of technical assistance has become increasingly apparent. However, the DOJ coordination regulations do not require Federal agencies to offer technical assistance to recipients of Federal financial assistance to help them comply with Title VI and other civil rights statutes.[697] DOJ has failed to require, through its coordination regulations or in a Title VI manual, the agencies to provide technical assistance and guidance to State and local recipient agencies.

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[697] *See* p. 87.

**Recommendation:** The regulations should require Federal agencies to provide a thorough program of technical assistance to their recipients. DOJ should require the agencies to provide technical assistance not only by request, but also when agencies identify deficiencies through desk-audits, compliance reviews, or reviews of recipients racial and ethnic data.

### Standards for Outreach and Education and Community Group Liaison

**Finding:** Although DOJ's coordination regulations contain a section on "Public dissemination of Title VI information," the requirements in the coordination regulations are insufficient because they do not require Federal agencies to conduct a comprehensive public education and outreach program. For instance, the coordination regulations do not require Federal agencies to initiate campaigns to inform the public about the existence of Title VI and the nature of its requirements for the agencies' particular programs, to hold civil rights conferences, or to maintain regular ties to community groups for the purpose of both informing them about Title VI and learning about their civil rights concerns.[698]

**Recommendation:** The regulations should require Federal agencies to have an ongoing, comprehensive education and outreach program to inform applicants, recipients, beneficiaries, and the public about Title VI as it relates to their federally funded programs.

### Standards for Monitoring State and Local Title VI Compliance Activities

**Finding:** Most agencies provide funding to State and local governments through continuing programs and block grants. The Federal agencies rely on the State and local governments to ensure Title VI compliance by their subrecipients. In effect, the State and local government agencies have the same responsibilities over their subrecipients that the Federal agencies have over their nongovernmental recipients. However, DOJ's coordination regulations do not require Federal agencies to monitor State and local government recipients' Title VI compliance programs, nor do they give guidance on the proper relationship between State and local governments and the Federal agencies.[699]

**Recommendation:** As Federal agencies rely increasingly on State and local government agencies to administer federally assisted programs, DOJ should provide guidance on the proper relationship between Federal agencies and their State and local recipients. DOJ should recognize that the relationship between Federal agencies and their State and local government recipients requires different enforcement procedures than those designed for ensuring Title VI compliance in programs operated by nongovernmental recipients of categorical grants. DOJ should create a formal oversight process that requires Federal agencies to oversee not only the State's compliance with Title VI, but also the State's methods of administration, policies, and procedures for monitoring the programs and activities of its subrecipients.

Because Congress intends to diminish the role of the Federal Government in domestic programs by creating State-administered block grants, DOJ should consider developing a formal relationship with State and local government block grant recipients. To ensure that State and local governments monitor the compliance activities of their subrecipients, DOJ should create a model delegation agreement between Federal agencies and their State and local government recipients. DOJ should design a formal delegation agreement that outlines specific compliance and enforcement duties for State and local recipients and establishes monitoring and oversight procedures for the Federal agencies. The delegation agreement should include procedures for conducting compliance reviews, complaint investigations, outreach and education, and racial and ethnic data collection. This type of delegation agreement will create accountability, while also allowing Federal agencies to rely on State and local governments to conduct their own compliance and enforcement activities.

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[698] *See* p. 87.

[699] *See* p. 88.

## Enforcement Support Activities: Oversight of Federal Agencies' Title VI Enforcement Programs

Executive Order 12,250 gives DOJ the responsibility to oversee the Federal agencies' Title VI enforcement programs to ensure that they are effectively and consistently enforcing the statute. However, CORS has ceased to conduct critical oversight activities, such as the interagency survey and onsite reviews of Federal agencies, that would allow it to determine whether the agencies are in compliance with Title VI.

DOJ's coordination is ineffective because its monitoring of Federal agency enforcement efforts is limited to a cursory review of Civil Rights Implementation Plans.[700] These reviews do not give DOJ enough information on the daily operations of the Federal agency civil rights offices or their long-term planning and budget needs. Without this information, DOJ has not been able to ensure that the Federal agencies are devoting the resources necessary to fund comprehensive Title VI implementation, compliance, and enforcement programs. In addition, DOJ does not monitor the Federal agencies' oversight of their State and local government recipients. Without effective Federal monitoring of State and local recipient programs, DOJ and the Federal agencies cannot ensure nondiscrimination in the use of Federal funds.

### Enforcement Plans

**Finding:** Although DOJ's coordination regulations require the submission of enforcement plans, DOJ has replaced the Civil Rights Enforcement Plan with the Civil Rights Implementation Plan. The Civil Rights Implementation Plan is the only plan the Federal agencies submit to CORS for review; however, it does not address sufficiently the elements necessary for comprehensive civil rights enforcement planning. Although DOJ's coordination regulations require timetables for compliance activities and a demonstration of staff allocations, the agency Civil Rights Implementation Plans rarely contain sufficient planning information. In addition, CORS does not hold agencies accountable to their planning documents from year to year.

**Recommendation:** DOJ should enforce the requirement in its coordination regulations that Federal agencies prepare annual Title VI enforcement plans. In particular, CORS should issue guidelines to Federal agencies on the preparation of Title VI enforcement plans or revise its Guideline on Agency Implementation Plans to include enforcement planning. CORS should define the procedures and terms necessary for developing an agency Civil Rights Enforcement Plan, such as preaward reviews, postaward desk-audit reviews, compliance reviews, complaint investigations, and data collection.

A Civil Rights Enforcement Plan should be a planning tool designed to ensure that Federal agencies meet their civil rights obligations. An enforcement plan demonstrates the relationships among each agency's statutory obligations, goals and objectives, priorities, initiatives, tasks, anticipated outcomes, prior accomplishments, staff allocations, resources, and program costs. Moreover, enforcement plans should include an analysis of an agency's accomplishments as compared to their goals and objectives. A formal review of an agency's goals and accomplishments from year to year holds agencies accountable for their responsibilities and activities.

In addition, CORS should require agencies to show a nexus between their civil rights activities and the costs of these activities. It is important for agencies to demonstrate their program expenditures and resources in addition to the salaries of the staff allocated to these activities. CORS should use this information to determine whether each agency is providing funds for specific Title VI activities, and the agencies should use CORS' assessment to support their own budget requests.

It is essential for CORS to consult with the Federal agencies in order to develop policies and procedures that serve the needs and practices of Title VI compliance and enforcement programs, while also ensuring that the agencies conduct and report on the programs that are essential to comprehensive Title VI compliance. It is essential that CORS develop definitions and procedures that serve the practical needs of each agency's federally assisted programs and civil rights programs, rather than compel agencies to manipulate their data to meet impractical and unrealistic categories.

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[700] *See* p. 90.

### DOJ Guidelines for Implementation Plans

**Finding:** Few, if any, agencies are complying with the DOJ Guideline for Agency Implementation Plans. Few of the plans provide sufficient information for CORS or the general public to garner an understanding of their civil rights programs, and none of the plans is used or could be used as management tools by the agencies. None of the agencies followed DOJ's Guidelines in preparing the sections on long-range policy goals and major and short-term objectives.[701] Despite these evident deficiencies, CORS never rejects an agency's Civil Rights Implementation Plan.[702]

Given the poor quality of most agencies' Civil Rights Implementation Plans, and given that reviewing the plans is currently CORS' only means of overseeing agencies' civil rights enforcement programs, it is surprising that CORS never rejects an agency's plan. Generally, CORS is satisfied with any plan of an agency that CORS staff believe has a good civil rights enforcement program. Apparently CORS is making no effort to ensure that the Federal agencies comply with DOJ's Guidelines.[703]

**Recommendation:** If CORS chooses to maintain the current Civil Rights Implementation Plan process rather than requiring agencies to submit Civil Rights Enforcement Plans, then DOJ should ensure that all agencies submit quality Civil Rights Implementation Plans that conform to DOJ's Guideline on Agency Implementation Plans. When a plan does not meet DOJ's minimum standards, DOJ should return the plan to the agency for revision.

### Quality of DOJ's Review of Civil Rights Implementation Plans

**Finding:** Although DOJ review of Civil Rights Implementation Plans can provide an overview of the Federal agencies' Title VI enforcement programs, Civil Rights Implementation Plans do not provide enough information for CORS to monitor effectively the quality of the agencies' Title VI enforcement programs.[704] The Civil Rights Implementation Plans are not a good substitute for other oversight mechanisms, in particular, interagency surveys and onsite reviews.[705] Therefore, DOJ's current practice of relying almost exclusively on reviews of Federal agencies' Civil Rights Implementation Plans as its sole method of overseeing the agencies' Title VI enforcement programs is unacceptable.

At times, DOJ has not compelled Federal agencies administering federally assisted programs to submit Civil Rights Implementation Plans. In one instance, DOJ refused to sign a letter drafted by CORS requesting that the Department of Transportation submit a plan as required by DOJ's coordination regulations.[706]

**Recommendation:** DOJ should provide CORS with sufficient resources to conduct effective oversight of the Federal agencies' Title VI programs. In particular, DOJ should allocate resources to supplement CORS' review of Civil Rights Implementation Plans with other oversight mechanisms, including interagency surveys and onsite reviews of the Federal agencies' Title VI programs.

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[701] *See* pp. 90–91.

[702] *See* p. 95.

[703] *See* p. 98.

[704] *See* p. 98.

[705] *See* p. 100.

[706] *See* p. 98.

CORS' review of the Civil Rights Implementation Plans should include holding the agencies accountable from year to year for their planning. For example, if an agency plan indicates that the agency intends to complete 10 compliance reviews during the year but it failed to do so according to the following year's plan, CORS should require the agency to explain and justify its deficiency. A comparison of agency plans from year to year will allow CORS to identify repeated deficiencies and provide assistance to remedy the problems.

### Interagency Surveys

**Finding:** Until 1981, CORS utilized interagency surveys as a proactive step in ascertaining the strengths and weaknesses of enforcement programs for Federal agencies that provide financial assistance.[707] These surveys were extremely valuable for making both DOJ and the Federal agencies aware of problems in the agencies' Title VI enforcement programs. They provided an excellent opportunity for DOJ to suggest changes that would increase the effectiveness of the agencies' Title VI enforcement programs. The consensus of CORS managers and staff is that DOJ should reinstitute interagency surveys.[708]

**Recommendation:** DOJ should reinstate interagency surveys, administered on a regular basis, as one key mechanism for overseeing the Federal agencies' Title VI programs. Given that no interagency surveys have been conducted since 1980, DOJ should initially administer the interagency survey to all Federal agencies with Title VI enforcement responsibilities. Afterwards, the survey can be administered periodically.

### Onsite Reviews of Federal Agencies

**Finding:** CORS does not conduct onsite audits of Federal agencies' Title VI enforcement programs. DOJ's own coordination regulations give the Assistant Attorney General for Civil Rights considerable authority to move beyond a mere paper review process provided through the Civil Rights Implementation Plans and the interagency surveys. The regulations state that "the Assistant Attorney General may issue such directives and take such action as he deems necessary to ensure that Federal agencies fulfill their responsibilities under Title VI."[709] CORS managers and staff support the use of onsite audits to ensure enforcement of Title VI by the Federal agencies.[710]

**Recommendation:** DOJ should use onsite reviews of Federal agencies' enforcement programs as a key mechanism for overseeing the Federal agencies' Title VI programs. DOJ should use onsite reviews to examine each agency's internal structure, the efficiency of their daily activities, and their compliance with DOJ directives and procedures. Onsite reviews are particularly important for decentralized agencies and agencies with regional and field offices. DOJ should also use onsite reviews to identify deficiencies that can be corrected through training and technical assistance.

### Letters of Findings Project

**Finding:** One way in which DOJ can ensure that the Federal agencies are fulfilling their responsibilities under Title VI in a consistent manner is for CORS to review agencies' letters of findings to determine whether agencies are correctly applying the law. However, CORS has never implemented its planned "Letters of Findings Project." Under the project, CORS required each agency to submit their letters of findings detailing the results of their complaint investigations. CORS would review the letters of finding to ensure consistent enforcement of all the statutes covered by Executive Order 12,250. CORS also planned to establish a system to identify and codify the major civil rights issues raised in the letters of finding.[711] In 1995, DOJ has suspended its plans to revive the letters of finding project.

**Recommendation:** CORS should revive and implement its letters of findings project in order to assist CORS in its review of agency Title VI programs. Reviewing the letters of finding allows CORS to examine agency policies and determine if the agencies are complying with Title VI laws, regulations, and policies. The review also provides CORS with another opportunity to identify potential deficiencies in an agency's Title VI compliance and enforcement program.

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[707] *See* p. 101.

[708] *See* p. 103.

[709] *See* p. 103.

[710] *See* p. 104.

### Facilitation and Monitoring of Delegation Agreements

**Finding:** Because many recipients receive Federal financial assistance from more than one agency to fund similar or related activities, the Federal agencies need cooperative programs or delegation agreements to prevent an overlap in Title VI enforcement. In accordance with Executive Order 12,250, DOJ has prepared a model memorandum of understanding to encourage cooperation among the agencies and to assist agencies in the development of delegation agreements.[712]

Although the DOJ model effectively details the responsibilities of both the lead agency and the delegating agency, DOJ has not clearly defined CORS' responsibility to coordinate and monitor delegation agreements. Under the prototype agreement, CORS relies on the lead agency to provide CORS with copies of all letters of findings and notify CORS of any referrals for litigation. DOJ does not require the lead agency to provide summary information to CORS or to ensure that the information is received by the delegating agency in time for inclusion in either agency's Civil Rights Implementation Plan.[713] However, CORS has not taken any affirmative or proactive steps to ensure that the cooperative arrangements are serving the compliance needs of the agencies. Instead, CORS simply treats the lead agency's duties under the delegation agreement as part of its overall Title VI enforcement activities without recognizing the additional responsibility the lead agency has accepted.[714] A senior CORS staff member expressed concern that CORS is "pretty far removed" from the operations of the delegation agreements. Because it does not monitor the agreements actively, CORS is dependent on the agencies to notify it of any problems with the delegation system.[715]

**Recommendation:** CORS should actively monitor all delegation agreements between Federal agencies. CORS should require lead agencies to provide information on their activities under delegation agreements separately from the Title VI compliance and enforcement they conduct for their own recipients. CORS also should require the lead agency to provide information on its enforcement activities to the delegating agency so that the delegating agency will be aware of the compliance status of its recipients. Moreover, CORS should use information provided by both the lead agency and the delegating agency to determine if the delegation agreement continues to serve the needs of both agencies.

### Litigation Support

**Finding:** As the DOJ unit with specialized knowledge of Title VI, CORS should play an active role in DOJ's Title VI litigation. Although CORS is not a litigation section in CRD, CORS is authorized to provide civil rights litigation support to DOJ's litigating sections.[716] A Commission review of DOJ reports on its Executive Order 12,250 activities going back to 1980 revealed only

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[711] *See* p. 105.

[712] *See* p. 106–07.

[713] *See* p. 107.

[714] *See* p. 107.

[715] *See* p. 109.

[716] *See* p. 109.

two instances in which the reports cited litigation support activities relating to Title VI. Thus, CORS' Title VI legal support activities have been minimal since its creation in 1979.[717]

CORS does not have a close working relationship with the CRD sections empowered to litigate under Title VI. When a Federal agency requests that DOJ litigate a Title VI case, the agency communicates directly with the section litigating the case, and there is no necessary CORS involvement. CORS does not record or monitor the Title VI cases referred to CRD's litigation sections. Therefore, DOJ does not have a mechanism for ensuring that CORS' expertise on Title VI enforcement is utilized in DOJ's Title VI litigation activities.[718]

Because all DOJ cases are litigated by attorneys in divisions defined by broad subject matter, DOJ does not have litigating attorneys who specialize in Title VI.[719] Furthermore, agencies may refer cases for litigation that do not fit naturally into the subject-matter expertise of any of the existing CRD sections.

**Recommendation:** DOJ should transfer Title VI litigation authority from CRD's litigation sections to CORS and provide CORS with litigation attorneys. This is particularly important for cases that are not within the expertise of CRD's litigation sections. However, CORS should seek assistance from the specific CRD program litigation section that may have program expertise to contribute on issues such as public housing, education and desegregation, and employment. In addition, CORS should initiate complaints alleging a pattern or practice of discrimination under the existing provisions in some block grant statutes, and under Title VI if Congress amends the statute to include this cause of action.[720]

In the event that DOJ does not transfer Title VI litigation authority to CORS, DOJ should require agencies to notify CORS when referring Title VI cases to DOJ for litigation. CORS should actively monitor all Title VI cases litigated by DOJ, and the CRD litigating divisions should consult with CORS on all Title VI cases.

### Legal Assistance and Interpretations

**Finding:** DOJ's 1981 "Implementation Plan for Executive Order 12,250" specified that DOJ would provide legal assistance in the form of formal legal opinions and reviews of regulations, issues, policies, and questions of law.[721] However, DOJ has not been proactive in providing agencies with legal assistance and policy interpretations with respect to Title VI in recent years.[722]

**Recommendation:** DOJ should revive its legal assistance and policy interpretation function. DOJ should regularly review agencies' regulations, policies, and findings to ensure that they are consistently applying the law. Furthermore, DOJ should encourage Federal agencies to seek its assistance on legal and policy matters. By providing Federal agencies with legal assistance in this form, DOJ would be better able to identify critical issues affecting Title VI enforcement and correct those problems.

### DOJ Oversight of State and Local Recipient Agencies

**Finding:** Executive Order 12,250 requires the Federal agencies, not DOJ, to ensure that State and local agency recipients of Federal funds are in compliance with Title VI. However, the increasing reliance on State and local agencies to administer Federal program funds has created obstacles for civil rights compliance and enforcement. However, DOJ has not examined the impact of block grants and other continuing State programs on Title VI implementation, compliance, and enforcement. Under block grant programs and other continuing State programs, States, in effect, assume the same civil rights responsibilities over their subrecipients that the Federal agencies have over State recipient agencies. This places the States in a position to monitor the distribution of block grant funding to their subrecipients; however, few consistent and effective Federal mechanisms exist to ensure that States sufficiently oversee and monitor the Title VI compliance activities of their subrecipients. Although ultimately the Federal agencies remain accountable for Title VI compliance by all of their recipients and subrecipients, the State's broad discretion to redistribute Federal funds to subrecipients has prevented the Federal agencies from tracking the Federal dollars and retaining control over their program recipients and subrecipients.

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[717] *See* pp. 109–11.

[718] *See* pp. 109–11.

[719] *See* pp. 109–11.

[720] For a further discussion of pattern or practice authority, *see* p. 132.

[721] *See* pp. 111–12.

[722] *See* pp. 111–12.

Moreover, block grant funding requires Federal agencies to assume responsibility for overseeing and monitoring the State agencies to the same extent that the Department of Justice is required to oversee and monitor the Federal agencies. In programs in which a funding agency provides Federal financial assistance exclusively to State agencies for redistribution to subrecipients rather than to direct recipients, the agency's primary function is to oversee and monitor Title VI enforcement as conducted by the relevant State agency.

Despite these barriers to effective Title VI implementation, compliance, and enforcement, DOJ has not required Federal agencies to establish a formal delegation of authority or memorandum of understanding in order to create accountability for Title VI activities. Furthermore, DOJ does not monitor the Title VI enforcement activities of State and local government recipients even though their role with respect to their subrecipients is similar to the role of the Federal agencies.[723]

**Recommendation:** CORS should recognize and analyze the unique civil rights enforcement relationship created by relying on State and local government recipients to monitor the compliance activities of their subrecipients. CORs should establish regular contact with State and local agencies with Title VI compliance responsibilities. CORS should provide them with technical assistance and training, and review their activities to ensure that Title VI is enforced at the State and local level. Without regular contact with State and local recipients, DOJ cannot determine whether the Federal funding agencies, whose responsibility it is to ensure that their State and local agency recipients are in compliance with the law, are complying with Title VI.

Moreover, CORS should establish procedures requiring Federal agencies to enter into formal delegation agreements or memorandum of understanding with State and local government recipients to clarify the responsibilities of each entity and provide accountability for their Title VI activity or inactivity. These agreements should require recipients to provide methods of administration and notification to complainants regarding their right to file complaints either with the State or local recipient or the Federal funding agency. To assist the Federal agencies and facilitate this process, CORS should develop a model agreement. Moreover, CORS should monitor these agreements along with delegation agreements between Federal agencies.

### Comment on Proposed Legislation

**Finding:** Reviewing proposed legislation is an essential element of CORS' mandate to ensure consistent and effective enforcement of Title VI. Currently CORS' activities are limited to commenting on legislation that directly involves civil rights. However, CORS does not analyze new funding statutes or other legislation that may pose a strain on civil rights enforcement for the Federal agencies or DOJ.[724]

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[723] *See* p. 112.

[724] *See* pp. 112–13.

**Recommendation:** CORS should review proposed legislation not only involving civil rights directly, but also provisions creating or affecting Federal financial assistance programs or the scope of Federal agency authority and procedures, such as welfare reform, health care reform, agency downsizing under the National Performance Review, and regulatory flexibility provisions. CORS should draft formal comments to Congress under the Assistant Attorney General for Civil Rights' signature and prepare testimony, if necessary, to voice CRD's opinions and provide suggested amendments. Through this process, CORS may ensure that Congress is informed of the civil rights consequences of its legislation.

### Review of Fund Termination and Suspension Decisions

**Finding:** The Federal agencies are not regularly providing DOJ with notice of their fund termination and suspension decisions as required in DOJ's guidelines, and DOJ is not reviewing the decisions.

**Recommendation:** DOJ should enforce its requirement that Federal agencies provide CORS with notification of all fund termination and suspension decisions. Notification is important so that CORS may be able to assist the Federal agencies with their voluntary compliance efforts to prevent a termination action. DOJ should review these decisions and determine if the agency action was appropriate.

## Coordination Initiatives and Agency Liaison Activities

Under Executive Order 12,250, CORS is authorized to conduct public education and outreach programs and community groups liaison activities relating to Title VI and to provide a variety of forms of assistance, such as technical support, training, and communicating information on Title VI, to Federal agencies to help them better enforce Title VI. CORS was actively engaged in Title VI-related outreach and education activities when it first began. However, CORS has virtually ceased its involvement in this area.[725]

### Public Outreach and Education

**Finding:** Given the far reach of Title VI and the public's inexperience with the scope of this statute, a national program to inform the public broadly about Title VI is needed. As the Federal coordinator for all Title VI enforcement activities, CORS is the logical entity to conduct public education and outreach programs.[726]

**Recommendation:** CORS should undertake a comprehensive nationwide campaign to educate the general public about Title VI. CORS should establish and maintain relationships with organizations and associations concerned with civil rights by utilizing a variety of techniques and strategies to ensure an effective and mutually rewarding relationship with DOJ's stakeholders and customers. For example, CORS should participate in meetings and conferences, conduct onsite visits, and prepare and distribute brochures, pamphlets, handbooks, and exhibits. As the primary liaison between DOJ and its constituency, CORS should identify existing and emerging issues that are of concern to the community and communicate these issues to the Federal agencies. CORS should prepare materials on a variety of topics, including procedures for filing complaints under Title VI, the relationship between Title VI and Title VII complaints in federally assisted programs, and the impact of health care reform on civil rights. In recognition of the importance of outreach and education programs to proactive Title VI enforcement efforts, CORS should establish a separate unit to perform these functions.

### Liaison with Community Groups

**Finding:** In recent years CORS has had "very minimal" contact with civil rights organizations either to discuss policies or to promote cooperation.[727]

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[725] *See* p. 114.

[726] *See* pp. 114–15.

[727] *See* pp. 115–16.

**Recommendation:** To ensure that CORS' implementation of its Title VI coordination responsibilities is responsive to the civil rights concerns of the community, CORS needs to reach out to community organizations to seek their advice and suggestions on important civil rights issues and ways of improving the Title VI enforcement effort. CORS should maintain regular contact with community organizations and civil rights groups as well as other concerned citizens to ensure that its Title VI coordination and oversight activities are responsive to the concerns of the community. CORS should seek guidance and proposals from these entities on its Title VI enforcement priorities, policies, and activities.

### Technical Assistance

**Finding:** The regular provision of technical assistance in a variety of forms to Federal agencies responsible for enforcing Title VI is an important function of CORS. However, CORS has not provided technical assistance to agencies concerning Title VI, except on an ad hoc basis. However, CORS has provided substantial amounts of technical assistance on other civil rights statutes, such as the Americans with Disabilities Act.[728] Furthermore, in its preliminary draft recommendations to the new Assistant Attorney General, the only recommendation for reviving CORS' Title VI technical assistance programs is a recommendation that CRD "convene periodic conferences and meetings for Federal agencies . . . to provide policy guidance, technical assistance, and training."[729]

**Recommendation:** CORS' agency coordinators should provide technical assistance to Federal agencies on a regular basis. CORS should assist agencies through position papers and model documents, not merely through conferences and meetings. In addition, CORS should provide technical assistance proactively when it identifies deficiencies in an agency's program, rather than waiting for requests from the agencies. CORS should also offer technical assistance routinely when new statutes, regulations, or policies are issued.

### Civil Rights Training

**Finding:** A major problem facing civil rights offices throughout Federal Government is a dearth of civil rights personnel who are knowledgeable about Title VI. Thus, the need for systematic, governmentwide Title VI training is evident. CORS is the logical entity to spearhead such an effort. However, CORS has not provided training activities exclusively addressing Title VI issues. Instead, CORS has included general Title VI information in its programs addressing other civil rights issues. The training has been limited to "seminars" on Title VI history and agency responsibilities under Title VI.[730] Although CORS staff support increased DOJ involvement in providing Title VI training, DOJ does not appear to be contemplating devoting more resources to its Title VI training activities.[731]

**Recommendation:** CORS should establish a civil rights training center to develop a governmentwide approach to civil rights training. The training center should conduct training in all civil rights issues for Federal, State, and local government agencies and judicial offices, universities, private industry firms and businesses, members of the legal community, community organizations and interest groups, and the general public. The center should develop programs and materials to train individuals in a variety of issues and areas, such as the relationship between federally assisted programs and civil rights laws, grant application procedures, implementation and compliance procedures, and the development of methods of administration. The center should target its training programs to address identified deficiencies.

The training center also should provide grants to organizations that conduct civil rights training in their areas of expertise, such as elementary and secondary education, higher education, job training programs, health and welfare services, public housing, and environmental justice. This will allow the training center to provide its participants with program-specific training presentations and materials.

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[728] *See* pp. 116–18.

[729] *See* p. 117.

[730] *See* pp. 118–20.

[731] *See* p. 119.

### Network and Clearinghouse for the Federal Agencies

**Finding**: Because of the number and variety of Federal financial assistance programs, it is crucial for CORS to serve as a central repository for information and assistance on Title VI. However, CORS currently does not function effectively in this area.[732]

**Recommendation:** CORS should devote additional resources to its clearinghouse function. CORS should develop a comprehensive computer database to coordinate the enforcement activities of the Federal agencies. CORS should maintain a reference library and clearinghouse of Federal agencies' strategic plans, regulations, policies, guidelines, and manuals to share with other agencies interested in developing their own materials. In addition, CORS should maintain a library of its briefs and court documents so that other agencies may use its legal analysis and arguments as a reference for their own administrative actions. Moreover, CORS should use these materials to develop training materials and education and outreach programs.

### The *Civil Rights Forum*

**Finding:** In the past, CORS provided information to Federal agencies and the general public on matters relating to Executive Order 12,250 through the periodic publication of the *Civil Rights Forum* (formerly the *Title VI Forum*). Although the *Forum* was an extremely valuable source of information on Title VI developments, over the objections of both CORS and CRD, DOJ discontinued publication of the *Forum* until spring 1995.

**Recommendation:** As DOJ resumes publication and distribution of the *Civil Rights Forum* for Federal agencies and community organizations, it should include in CORS' budget statement the specific costs of publication, such as staff hours and publication and distribution costs. In addition to updating readers on issues, legislation, administrative and court decisions, and agency activities that all involve civil rights directly, the *Forum* should include discussions of issues that may indirectly affect civil rights implementation, compliance, and enforcement. DOJ should also ensure that the *Forum* is distributed not only to Federal agency civil rights offices, but also to Federal agency program and grant offices. Moreover, DOJ should distribute the *Forum* to recipients of Federal financial assistance, particularly State and local governments.

### Interagency Coordination

**Finding:** Although DOJ has participated in an Interagency Coordinating Council focused on section 504 of the Rehabilitation Act of 1973, it has not regularly coordinated with other Federal agencies on Title VI. CORS' managers and staff support expanding the role of the Council to include Title VI or creating another council to address issues related to Title VI.

**Recommendation:** As part of its Executive Order 12,250 leadership responsibilities, CORS should conduct regular coordination meetings with the Federal agencies to discuss issues related to Title VI enforcement. CORS should hold these meetings either by expanding the scope of the Interagency Coordinating Council, or by creating a forum devoted exclusively to Title VI. Periodic meetings will give the agencies an opportunity to raise new issues, while allowing CORS to address common concerns.

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[732] *See* pp. 120–22.

## Chapter 4

# Requirements and Key Elements of a Title VI Enforcement Program

### Introduction

Almost every executive department or agency administers at least one federally assisted program[1] that is subject to the requirements of Title VI. These programs distribute hundreds of billions of dollars in Federal spending annually and affect virtually every aspect of American life. Pursuant to Title VI, every executive agency "empowered to extend Federal financial assistance to any program or activity by way of grant, loan, or contract" has a legal obligation to ensure that all persons regardless of their race, color, or national origin are afforded equal opportunity to benefit from that assistance.[2] To fulfill this obligation, each agency must have a comprehensive and proactive Title VI enforcement program to eliminate and prevent discrimination in each of the federally assisted programs it administers.

Pursuant to Executive Order 12,250,[3] every agency that extends Federal financial assistance covered by Title VI is subject to the U.S. Department of Justice's (DOJ) coordination regulations[4] and guidelines.[5] In addition, Executive Order 12,250 requires each agency to issue appropriate regulations or policy guidance to implement the nondiscrimination provisions of the statutes subject to Executive Order 12,250.[6]

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[1] The U.S. Department of Education's (DOEd) Title VI implementation regulations define Federal financial assistance as follows:

(1) grants and loans of Federal funds;
(2) the grant or donation of Federal property and interests in property;
(3) the detail of Federal personnel;
(4) the sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient; and
(5) any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.
34 C.F.R. § 100.13(f) (1994).

[2] 42 U.S.C. § 2000d-1 (1988).

[3] Executive Order 12,250 also gives the Attorney General coordination and oversight responsibility for the Federal Title VI enforcement effort. *Id. See* discussion in chapter 2, pp. 47–48. *See also* discussion in chapter 3, pp. 76–87, on the Department of Justice's implementation, enforcement, and policies under Executive Order 12,250.

[4] 28 C.F.R. Part 42, Subpart F (1994).

[5] *Id.* § 50.3.

[6] Exec. Order No. 12,250, § 1–402, 3 C.F.R. 298 (1981), *reprinted in* 42 U.S.C. § 2000d-1 (1988). The statutes covered are Title VI of the Civil Rights Act of 1964, Pub. L No. 88–352, 78 Stat. 252 (codified as amended at 42 U.S.C. §§ 2000d to 2000d-7 (1988)), Title IX of the Education Amendment Act of 1972, Pub. L. No. 93–112, Title IX, 86 Stat. 373 (codified as amended at 20 U.S.C. §§ 1681–1688 (1988)), and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988 & Supp. V 1993).

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To ensure uniformity and enforceability of these agency regulations, DOJ and the U.S. Commission on Civil Rights cooperated to develop the compliance standards published in the Commission's 1966 *Compliance Officer's Manual.*[7] The manual provides additional direction to agencies on their Title VI enforcement programs by identifying specific requirements for agencies' Title VI enforcement activities. This chapter relies on the 1966 manual, because, to date, DOJ has neither issued its own compliance manual nor revised the Commission's *Compliance Officer's Manual.*[8] This chapter defines and explains the requirements identified in the manual and discusses the elements that are essential to effective Title VI enforcement. In addition, the chapter describes the types of information the Commission reviewed in assessing the Title VI programs of the Federal agencies examined in chapters 5 through 14.

## Federally Funded Programs

Each agency chapter briefly describes the federally assisted programs administered by the agency. To assist the reader in understanding the scope and complexity of such programs, the chapters also describe the nature of the programs and the responsibilities of the operating divisions that administer them. In addition, they indicate the number of programs administered annually by the agencies, an estimated total of the amount of Federal financial assistance distributed annually, and the approximate number of grants and recipients involved. Thus, the chapters demonstrate the magnitude of Federal funds, federally sponsored programs, and funding recipients involved in Title VI enforcement. In addition, the variety and complexity of the programs, benefits, services, and activities demonstrate why agencies should tailor their Title VI enforcement procedures specifically to correspond with the objectives of their assistance programs and activities.

## Regulations, Guidelines, Policies, and Procedures

### Regulations

DOJ's coordination regulations require agencies to issue Title VI implementation regulations subject to approval by the Assistant Attorney General for Civil Rights.[9] DOJ relies on the U.S. Department of Education's (DOEd) Title VI regulations as a model for all other agencies.[10] DOEd's regulations contain provisions addressing Title VI compliance requirements; procedures for conducting enforcement mechanisms, such as complaint investigations and compliance reviews; procedures for executing hearings, decisions, notices, and sanctions for noncompliance; and judicial review of agency decisions.[11] These provisions inform recipients and beneficiaries of their obligations and rights in the Title VI implementation, compliance, and enforcement process.

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[7] U.S. Commission on Civil Rights, *Compliance Officer's Manual: A Handbook of Compliance Procedures under Title VI of the Civil Rights Act of 1964* (1966), p. i (hereafter cited as *Compliance Officer's Manual*). The Commission produced the manual in response to a request from the Attorney General in 1965 and under its authority to serve as a national clearinghouse for civil rights information. Ibid., p. 1.

[8] *See* U.S. Commission on Civil Rights, *Survey of The Department of Justice's Oversight and Coordination Responsibilities for Consistent and Effective Implementation of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Justice, Q. 30, p. 13 (hereafter cited as DOJ Survey). According to DOJ, the Coordination and Review Section (CORS) developed a draft Title VI compliance manual in 1977, but never released it. The DOJ Survey indicates that DOJ failed to release its own manual because of a review of Title VI implementation policies and developing case law, and the change of presidential administrations in 1981. According to the DOJ Survey, CORS plans to publish a final version of a compliance manual. Ibid.

[9] 28 C.F.R. § 42.403 (1994).

[10] *See* DOJ Survey, Q. 14, p. 6. DOEd's regulations were written originally for the Department of Health, Education, and Welfare, and may be found at 34 C.F.R. Part 100 (1994). DOJ also indicated that it uses its own Title VI regulations as a model for other agencies. DOJ Survey, Q. 14, p. 6. *See* 34 C.F.R. Part 42, Subpart C (1994).

[11] 34 C.F.R. §§ 100.6–110.11 (1994).

### Form

The agency chapters indicate that some agencies combine their Title VI regulations with regulations implementing other civil rights statutes. As a result the regulations may not reflect adequately the individual requirements of each civil rights statute.[12] For example, combined regulations may not address variations among the civil rights statutes regarding the types of data and evidence that the agencies must collect to prove a civil rights violation. Unless clear references to the relevant civil rights statutes are included, combined regulations also may confuse the reader as to which requirements and procedures apply specifically to Title VI.

### Updating and Revisions

Each agency chapter provides citations to the agency's Title VI implementation regulations and the date of DOJ's final approval of them. The date of the latest approval illustrates whether the agency has updated its regulations, or developed guidelines and policies, to reflect and clarify changes in Title VI. For example, the Civil Rights Restoration Act of 1987 amended Title VI by clarifying the definition of the phrase "program or activity" as it applies to two issues: 1) the scope of Title VI's nondiscrimination language, and 2) the extent of an agency's authority to terminate Federal funds as a sanction for noncompliance.[13] With respect to the first issue, the Civil Rights Restoration Act amended Title VI and restored the applicability of Title VI's nondiscrimination provision to the entire entity, not simply the particular Federal financial assistance program operated by it.[14] For example, if the mathematics department of an educational institution receives a Federal grant, the entire institution is prohibited from discrimination under Title VI. Regarding the second issue, the Civil Rights Restoration Act restored agencies' authority to terminate or suspend funds in the particular federally assisted program in which discrimination is found, or in programs "infected" by discrimination elsewhere in the operations of the entity.[15] In general, the act significantly affected the enforcement of Title VI by reinforcing the broad reach of Title VI's nondiscrimination provision and the Federal agencies' fund termination authority. The agency chapters address whether agencies have updated their regulations to reflect these and other modifications to Title VI compliance and enforcement requirements.

### Appendix of Federally Assisted Programs and State Continuing Programs

DOJ's coordination regulations require each agency to include an updated appendix to its regulations listing the types of Federal financial assistance to which the Title VI regulations apply.[16] A comprehensive and current list of programs covered by the regulations is essential for the agencies' enforcement efforts because it defines the scope of the agency's Title VI authority. In addition, because the program appendix is available to the general public, it informs actual and potential recipients, participants, and beneficiaries of the funding programs that are subject to the requirements of Title VI. The program appendix also assists in notifying potential and actual recipients of their Title VI responsibilities when they accept Federal financial assistance and educating potential and actual beneficiaries about their rights under Title VI.

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[12] *See, e.g.*, "Nondiscrimination in Programs Receiving Federal Assistance from the Environmental Protection Agency," 40 C.F.R. Part 7 (1994).

[13] Pub. L. No. 100–259, 102 Stat. 28 (codified as amended at 20 U.S.C. §§ 1681note, 1687, 1687note, 1688, 1688note (1988); 29 U.S.C. §§ 706, 794 (1988 & Supp. V 1993); 42 U.S.C. §§ 2000d-4a, 6107 (1988)). The Civil Rights Restoration Act of 1987 amended Title VI to cover all of the operations of an entire institution or entity if any part of it received Federal financial assistance. *See* 42 U.S.C. § 2000d-4a (1988). *See* chapter 2, pp. 36–40, for a further discussion on the history and impact of the Civil Rights Restoration Act of 1987.

[14] U.S. Congress, Senate, Committee on Labor and Human Resources, *Civil Rights Restoration Act of 1987*, 100th Cong., 2d sess., S. Rept. No. 64, p. 2, 17, *reprinted in* 1988 U.S.C.C.A.N. 3, 19 (hereafter cited as CRRA Senate Committee Report).

[15] CRRA Senate Committee Report, p. 20, *reprinted in* 1988 U.S.C.C.A.N. 3, 22.

[16] 28 C.F.R. § 42.403(d) (1994).

Agencies' program appendices sometimes contain a list of continuing State programs and a list of all other Federal financial assistance programs.[17] Continuing State programs are ongoing programs operated by State governments that receive funding regularly from Federal Government agencies. The distinction between categories of programs made in the appendices is an important informational mechanism in light of the specific regulatory requirements DOJ imposes on State agencies administering continuing programs.[18] To implement DOJ's requirements, agencies' Title VI regulations usually contain specific procedures for continuing State programs.[19] A separate appendix for continuing State programs is a simple method of indicating the specific programs to which those procedures apply.

The agency chapters address whether the agencies' regulations include an appendix; whether that appendix is updated annually, both in the Civil Rights Implementation Plans submitted to DOJ and in the *Federal Register*; and whether the appendix embodies a separate list for continuing State programs.[20]

### Content

Other than requiring an updated appendix, DOJ's coordination regulations do not specify the content of the agencies' regulations. However, DOJ does apply the standards published in the Commission's 1966 *Compliance Officer's Manual*.[21] To implement and enforce the objectives of Title VI, the Commission's *Compliance Officer's Manual* specifies that each agency should:

- Define Federal financial assistance and the recipients who are affected;
- Delineate specific forms of discrimination which are prohibited with examples in various agency programs;
- Require certain promises (assurances and statements of compliance by recipients) designed to ensure nondiscrimination in the operation of each program receiving Federal financial assistance from the agency;
- List the procedures for effecting compliance and for handling complaints of discrimination;
- Provide a list of agency programs and activities covered by Title VI;
- Require that agency officials issue necessary implementing instructions and procedures; and
- Set forth the procedures to be followed in the case of noncompliance.[22]

The agency chapters indicate whether the agencies have complied with these requirements. It is essential that the agencies include these provisions in their regulations as the framework for uniform and comprehensive Title VI enforcement. Incorporation of these provisions into agency regulations also serves to inform recipients, beneficiaries, participants, and other individuals affected by federally funded programs of their responsibilities and rights under Title VI.

### Specific Discriminatory Practices

The *Compliance Officer's Manual* also provides a list of specific discriminatory practices that must be prohibited by each agency's regulations.[23] These practices include the following:

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[17] *Compare* 34 C.F.R. Part 100, Appendix A, "Federal Financial Assistance to Which These Regulations Apply," Part 1, "Assistance other than for State-Administered Continuing Programs," *with* 34 C.F.R. Part 100, Appendix A, "Federal Financial Assistance to Which These Regulations Apply," Part 2, "Continuing Assistance to State-Administered Programs" (1994).

[18] *See* 28 C.F.R. § 42.410 (1994). *See* pp. 178–80, for a further discussion of DOJ's requirements for continuing State programs.

[19] *See, e.g.*, 29 C.F.R. § 31.6(b) (1994); 34 C.F.R. § 100.4(b) (1994); 45 C.F.R. § 80.4(b) (1994).

[20] 28 C.F.R. § 42.403(d) (1994).

[21] *Compliance Officer's Manual*, p. 1.

[22] Ibid., pp. 4–5.

[23] Ibid., p. 5. In its response to the Commission's survey, DOJ indicated that it requires each agency's regulations to include the list of prohibited discriminatory practices that appear in the *Compliance Officer's Manual*. *See* DOJ Survey, Q. 15, p. 7.

- Denial to an individual of any service, financial aid, or other benefit provided under the program;
- Distinctions in the quality, quantity, or manner in which the benefit is provided;
- Segregation or separate treatment in any part of the program;
- Restriction in the enjoyment of any advantages, privileges, or other benefits provided to others;
- Different standards or requirements for participation;
- Methods of Administration which directly or through contractual relationships would defeat or substantially impair the accomplishment of effective nondiscrimination;
- Discrimination in any activities conducted in a facility built in whole or in part with Federal funds;
- Discrimination in any employment resulting from a program which has a primary purpose of providing employment.[24]

This list of prohibited activities is not intended to limit the agencies but rather is designed to detail those activities that must be prohibited to comply, at a minimum, with the requirements of Title VI. In addition to meeting these minimum requirements, agencies have the authority to prohibit additional activities in their regulations and guidelines.[25] Agencies have the flexibility to test the limits of Title VI and to tailor their Title VI regulations to address unique aspects of their federally assisted programs and activities.

The agency chapters reflect the extent to which the agencies' regulations comply with the minimum requirements of DOJ and the Commission's *Compliance Officer's Manual*. In addition, they reflect the extent to which the regulations prohibit a broader range of discriminatory activities. The agency chapters also describe agency regulations that are unique or more extensive than those contemplated by DOJ and the Commission's *Compliance Officer's Manual*. This information is important because recipients and beneficiaries rely primarily on the requirements found in the agencies' regulations to comply with Title VI. Precise examples of discriminatory practices are necessary to ensure that funding recipients and beneficiaries, as well as Federal agency personnel, are aware of the conduct proscribed by Title VI.

### Employment Discrimination

Title VI expressly prohibits employment discrimination in federally assisted programs "where a primary objective of the Federal financial assistance is to provide employment."[26] DOJ's coordination regulations further define employment practices covered by Title VI as those that:

> (1) Exist in a program where a primary objective of the Federal financial assistance is to provide employment, or
> (2) cause discrimination on the basis of race, color or national origin with respect to beneficiaries or potential beneficiaries of the assisted program.[27]

When an employment practice associated with the administration of a federally funded program is likely to cause discrimination against that program's actual or potential beneficiaries, the regulations prohibit the employment action or adverse impact regardless of whether the program's primary purpose is to provide employment.[28] This broader definition of covered employment ensures that discrimination does not occur in any aspect of a federally funded program.

The agency chapters identify whether the agencies' definitions of employment discrimination include, at a minimum, discrimination when the primary objective of the program is providing employment. They also compare each agency's definition with those in either DOJ's coordination regulations or DOEd's regulations to determine whether the agency's regulations prohibit employment discrimination in *all* federally assisted programs, regardless of the program objective. Agency regulations should prohibit all discriminatory employment practices that deny equal benefits to, participation in, or otherwise discriminate against beneficiaries, program participants, or the affected community.

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[24] *Compliance Officer's Manual*, p. 5.

[25] DOJ Survey, Q. 14, p. 6. *See also* 28 C.F.R. § 42.404(a) (1994). All proposed agency Title VI regulations must receive approval from the Assistant Attorney General for Civil Rights. *Id.* § 42.403.

[26] 42 U.S.C. § 2000d-3 (1988). *See* chapter 2, pp. 34–36, for a further discussion and analysis of employment discrimination under Title VI.

[27] 28 C.F.R. § 42.402(f) (1994). In 1983, DOJ issued procedures for processing employment discrimination complaints under Title VI. *See id.* Part 42, Subpart H.

[28] *See* discussion in chapter 2, pp. 34–36.

### Guidelines

In addition to requiring agencies to issue Title VI regulations, DOJ's coordination regulations also require each agency to publish Title VI guidelines for each type of Federal financial assistance program under its jurisdiction.[29] Specifically:

> The guidelines shall describe the nature of Title VI coverage, methods of enforcement, examples of prohibited practices in the context of the particular type of program, required or suggested remedial action, and the nature of requirements relating to covered employment, data collection, complaints, and public information.[30]

In a 1979 "Checklist for Analysis of a Federal Agency's Title VI Enforcement Effort," DOJ indicated that a sound Title VI enforcement effort requires agencies to "develop guidelines, as a program specific supplement to [their] Title VI regulations, for each Title VI covered program." DOJ also requires agencies to distribute these guidelines to recipients, beneficiaries, compliance officers, and the general public.[31] In addition, DOJ's coordination regulations require agencies' guidelines to provide for "the collection of data and information from applicants for and recipients of Federal assistance sufficient to permit effective enforcement of Title VI."[32]

Guidelines specific to each program are a critical feature of Title VI enforcement. They provide recipients, as well as agencies' program offices, with program-specific information on compliance with the Title VI requirements. Program-specific guidelines are particularly important for States that administer continuing programs.[33] Because States, rather than the Federal agencies, administer these programs, Federal agencies often delegate responsibility to the States to perform many enforcement activities, such as compliance reviews and complaint investigations. Guidelines establish definitive compliance standards and compliance review procedures for both the agencies and the States assuming Title VI compliance responsibility.

For these guidelines to be effective, they should define the exact nature of the agency's Title VI requirements, establish methods of administration or requirements for States assuming Title VI compliance responsibility for their subrecipients, and ensure that recipients conduct self-assessments of their compliance status and take voluntary action to correct any deficiencies noted in the self-assessments.[34] Specifically, they should include detailed complaint procedures, investigative methods, timetables for filing complaints, methods of enforcement, and remedial action procedures. The agency chapters describe the content of the agencies' specific program guidelines, if any, and assess whether the guidelines contain adequate Title VI compliance information and procedures. The agency chapters also state whether the agency has issued guidelines designed specifically for State and local continuing programs. In addition, they address whether guidelines are distributed to funding recipients, beneficiaries, and affected communities[35] to ensure that they are informed of the responsibilities and rights created by Title VI.

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[29] 28 C.F.R. § 42.404(a) (1994).

[30] *Id.*

[31] U.S. Department of Justice, Civil Rights Division, "Checklist for Analysis of a Federal Agency's Title VI Enforcement Effort," *Title VI Forum*, vol. 4, no. 2 (Fall 1979), p. 12, nos. 26–28 (hereafter cited as DOJ Title VI Checklist).

[32] 28 C.F.R. § 42.406(a) (1994). *See* pp. 180–81, for a more extensive discussion of issues pertaining to data collection and analysis under Title VI.

[33] *See* pp. 178–80, for a further discussion of the requirements on State continuing programs.

[34] *Compliance Officer's Manual*, § 6.311, p. 7.

### Policies

Executive Order 12,250 mandates that agencies "shall issue appropriate implementation directives . . . in the nature of policy guidance."[36] These policy statements should define and elaborate on standards for compliance with Title VI. Policy statements and directives provide agency officials, recipients, beneficiaries, and the general public with an understanding of the practical meaning and intent of Title VI. They also inform them about agencies' interpretations of emerging civil rights issues. The regular issuance of policy statements permits observers to trace the historical and political development of executive agency Title VI policies, and allows DOJ to ensure that all agencies' policies are consistent with each other and with those issued by DOJ.

The agency chapters identify Title VI enforcement issues that may require explicit policy guidance. The agency chapters also state whether the policy statements are made available to funding beneficiaries, as well as recipients.

### Procedures

Agencies' regulations should establish basic procedures for complaint processing, postaward reviews, achieving compliance, and imposing sanctions for noncompliance. In addition, each agency should issue specific procedures or compliance manuals that aid in the daily operation of Title VI enforcement. These procedures should be more detailed and specific than the procedures embodied in the regulations. Because of the variety and complexity of the covered programs, agencies need to tailor their Title VI procedures to meet the needs of each specific assistance program they conduct. The procedures should address the entire compliance process, from application and preaward requirements through compliance review and complaint processing.[37] Such procedures are essential because the agency staff, recipients, and beneficiaries need to understand clearly the criteria used to determine compliance with Title VI. Procedures or manuals also may provide program participants and beneficiaries with step-by-step instructions on filing complaints against funding recipients. Such instructions assist beneficiaries in exercising fully their rights under Title VI.

The agency chapters describe the content and assess the quality of the agency procedures and compliance manuals. The procedures are assessed for their scope, clarity, and consistency with the Commission's compliance manual. In addition, some agency chapters state to whom the agencies issue the procedures and manuals; how, if at all, they are used by regional and field staff, recipients, and beneficiaries; and whether the procedures were reviewed and approved by DOJ.

## Organization, Budget, Staffing, and Workload of Agencies' Civil Rights Enforcement Function

### Organization

DOJ's coordination regulations do not provide detailed instructions for structuring an effective agency Title VI compliance program. They also do not indicate the appropriate relationship between an agency's Title VI enforcement program and other civil rights responsibilities. Each agency is permitted to structure its Title VI enforcement program to fit its particular funding program needs. Although this approach affords agencies the flexibility to design their own structure, it does not ensure adequately uniform and comprehensive enforcement of Title VI. For Title VI enforcement to be effective, agencies' organizational structure should meet certain key criteria based on DOJ's Title VI Checklist.[38]

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[35] The person or persons served or likely to be directly or indirectly affected by a program or activity receiving Federal financial assistance from a department or agency.

[36] Exec. Order No. 12,250, 3 C.F.R. 298, § 1–402 (1980), *reprinted in* 42 U.S.C. § 2000d-1 note (1988).

[37] *See* DOJ Title VI Checklist, p. 12, no. 25.

### *Organizational Placement of the Primary Civil Rights Office*

DOJ's Title VI Checklist indicates that the head of the civil rights office should report "to a sufficiently high level authority within the agency to be effective."[39] Furthermore, "there [should be] a demonstrated commitment on the part of top agency management to enforce Title VI."[40] The placement of the civil rights office serves as one way to judge whether civil rights enforcement is a high priority for the agency. For example, the closer the civil rights office director is to the agency head in the chain of command, the more likely that civil rights will be a priority for the agency. In agencies where the head of the civil rights office reports directly to the agency head, civil rights enforcement is likely to be given a higher priority than when the head of the civil rights office is several levels removed from the agency head in the chain of command. In addition, if the civil rights office is on an equal plane with the program or operational divisions in the overall structure of the agency, then civil rights compliance will be as important as all the other prerequisites for recipients of federally assisted programs. In a 1994 letter to the director of the U.S. Department of Transportation's civil rights office, the Acting Attorney General reiterated and elaborated DOJ's position: "A strong department-level civil rights office is needed. . . . To succeed, this office needs the clear backing of the Secretary coupled with sufficient formal authority to exercise a variety of important functions, including: policy and procedures development; training; technical assistance; information systems management; quality control; and monitoring and evaluation."[41]

The agency chapters address where the civil right office fits within the agency's hierarchy and the scope of its authority over the administration of federally assisted programs. The chapters explain the chain of command within each agency and whether the operational or program divisions are accountable or responsible to the civil rights office in the area of Title VI enforcement.

### *The Primary Civil Rights Office and Regional and Field Offices*

DOJ's Title VI Checklist indicates that there should be "organizational and managerial links between [the agency's civil rights office] and each subsequent level of enforcement."[42] The former Acting Assistant Attorney General for Civil Rights wrote, "[c]ivil rights staff should report to civil rights, not program office, supervisors. Programmatic and civil rights responsibilities differ. The independence of the civil rights enforcement function is needed when civil rights interests conflict with operational programmatic interests."[43]

The organizational structure should enable the head of the agency's primary civil rights office to oversee all agency components that have significant civil rights responsibilities. For example, under DOJ's coordination regulations, if an agency delegates the responsibility for approving applications or specific projects to regional or area offices, then the agency must ensure that the regional or area offices have staff trained in Title VI implementation, compliance, and enforcement.[44] The regional or area personnel with Title VI responsibilities must perform all of the review functions required of the agency. If the civil rights staff in an agency's regional offices report directly to the head of the agency's civil rights office, Title VI enforcement is likely to be coordinated better than if those staff report to regional administrators who are responsible only indirectly or incidentally for civil rights enforcement. To evaluate the quality of Title VI enforcement conducted by the regional offices, it is important to understand the structures and placements of the various regional offices. The effectiveness of the enforcement depends on the strength of coordination efforts between the regional civil rights offices or officials and the civil rights headquarters, between the regional offices and the operational or program headquarters offices, and between the civil rights offices and the operational or program divisions. Because the head of the civil rights office specializes in civil rights issues, he or she will be more knowledgeable than the regional administrator of program offices about civil rights laws and enforcement procedures and will be able to ensure that civil rights policy and enforcement is consistent throughout all levels of the agency.

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[38] *See* DOJ Title VI Checklist, p. 10.

[39] Ibid., p. 10, no. 8.

[40] Ibid., p. 11, no. 9.

[41] James P. Turner, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, letter to Antonio J. Califa, Director, Departmental Office of Civil Rights, Office of the Secretary, U.S. Department of Transportation, Feb. 2, 1994, p. 2 (hereafter cited as Turner letter).

[42] DOJ Title VI Checklist, p. 11, no. 11.

[43] Turner letter, p. 2.

[44] 28 C.F.R. § 42.407(a) (1994).

Because of the increasing diversity of federally assisted programs and the large number of recipients and beneficiaries, it is important for agencies to structure their civil rights offices based on whether the Federal agency or State and local recipients administer the programs; the variety of the issues covered in the programs; and whether the programs are administered by the Federal agency headquarters, the Federal agency's regional or field offices, or State and local recipients. In addition, the structure of the office should be determined, in part, by the types of disbursement mechanisms the agency employs when it administers financial assistance programs.

The agency chapters address the design and composition of the agencies' civil rights offices. To this end, the chapters describe the units within the civil rights headquarters and the role and placement of any regional civil rights offices. Each agency chapter also explains whether Title VI enforcement is conducted centrally through the agency headquarters, or whether enforcement is decentralized and conducted, at least in part, by regional and field offices. If the regional offices play a role in Title VI enforcement, the chapter also describes and assesses any informal designations of Title VI responsibility or formal regulatory delegations of Title VI enforcement authority from the headquarters to the regions. In addition, the agency chapters explain to whom the regional office personnel or civil rights officials report and the nature of the civil rights headquarters supervision, if any, over the regional civil rights offices.

### *The Primary Civil Rights Office: Authority Within the Agency*

DOJ's checklist states that civil rights offices should have sufficient authority to ensure that discrimination is eradicated in the agency's federally assisted programs.[45] This is particularly critical because by placing Title VI offices in subordinate positions to program offices, agencies have "compromised the operational integrity of these offices."[46] For example, according to the DOJ checklist, the civil rights office should have the power and position to "hold up approval of grant applications" based on a finding of noncompliance.[47] The civil rights office also should be in a position to develop and issue agencywide policy on civil rights issues.[48] Furthermore, all Title VI covered programs within the agency should be subject to the review authority of the civil rights office.[49]

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[45] DOJ Title VI Checklist, p. 10.

[46] U.S. Department of Justice, Civil Rights Division, "Title VI—Fifteen Years Later. . . ," *Title VI Forum*, vol. 4, no. 2 (Fall 1979), p. 8 (hereafter cited as "Title VI—Fifteen Years Later").

[47] DOJ Title VI Checklist, p. 10, no. 3.

[48] Ibid., p. 10, no. 7.

[49] Ibid., p. 11, no. 12.

The structure and placement of an agency's civil rights enforcement program is one indication of the role civil rights plays in the overall operations of the agency. For this reason, each agency chapter identifies and describes the agency's primary civil rights office and its responsibilities, and explains the relationships among the civil rights office, the operational and program divisions, the regional and field offices, and the general counsel within each agency. In addition, each agency chapter determines whether the civil rights office contains independent and specialized legal support or whether it must seek legal advice from the agency's office of general counsel. This information is important because it explains whether the agency has a separate civil rights enforcement office or whether the operational divisions and program managers share in the responsibility for Title VI enforcement. In addition, the structure of the offices helps to illustrate whether Title VI enforcement is monitored adequately by the responsible agency.

### *Internal and External Civil Rights Functions and Title VI Enforcement Responsibilities*

DOJ also indicates that offices that focus on issues other than Title VI enforcement do so to the detriment of ensuring nondiscrimination in funded program services.[50] For example, a civil rights office conducting Title VI and other external civil rights activities also may be responsible for internal equal employment opportunity matters. Such an organizational structure is preferable to making programmatic offices, such as administrative or personnel offices, responsible for Title VI. However, when internal and external civil rights enforcement are combined in the same office, it is necessary for agencies to meet the safeguards suggested by DOJ. Title VI and other external civil rights enforcement should be carried out by a separate unit, including separate supervisors, staff, and budget. Unless the foregoing safeguards are instituted, resources may be diverted from the enforcement of civil rights statutes in federally assisted and conducted programs to internal civil rights responsibilities.

It is important to understand the mission of the civil rights office and to determine whether Title VI enforcement is a priority civil rights program. It is also important to understand whether the civil rights office is responsible for enforcing Title VI in all of the agency programs, or only in selected agency programs. The agency chapters address the mission of each agency's civil rights office. Each agency chapter describes the responsibilities of the office in terms of the statutes enforced and its role in the enforcement process. In addition to describing the nature of each civil rights office's Title VI responsibilities, each chapter explains whether the office is also responsible for enforcing other civil rights statutes in federally assisted programs, such as Title IX of the Higher Education Amendments Act of 1972[51] and section 504 of the Rehabilitation Act of 1973.[52] The agency chapters also state whether each office has other civil rights responsibilities, such as internal equal employment obligations and obligations pursuant to the Americans with Disabilities Act of 1990.[53]

### *Other Offices with Title VI/Federal Assistance Responsibility*

Each agency chapter describes the civil rights responsibilities, if any, of the other offices within the agency. In particular, the chapters address the role the operational or program divisions play in Title VI enforcement. In some agencies, the operational divisions, at headquarters or in the regions, may conduct Title VI preaward compliance and certification as part of their general grant approval process.[54] In these instances, the agency chapters explain whether these preaward responsibilities were delegated officially to the operational divisions. This appears to be a particularly important issue at the Department of Health and Human Services because, although the operational divisions state that they have Title VI enforcement responsibilities, the Office for Civil Rights claims not to have delegated any Title VI responsibility.

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[50] "Title VI—Fifteen Years Later," p. 9. In 1994, DOJ stated, "[w]hen 'internal' civil rights enforcement . . . and 'external' civil rights enforcement . . . are combined organizationally, EEO [equal employment opportunity] priorities and activities tend to overwhelm external enforcement." Turner letter. In particular, according to DOJ, "civil rights specialists should be assigned full-time to external enforcement. . . . It generally is not desirable to assign civil rights responsibilities to program staff as 'collateral duties.'" Ibid.

[51] 20 U.S.C. §§ 1681–1688 (1988).

[52] 29 U.S.C. § 794 (1988 & Supp. V 1993).

[53] Pub. L. No. 101–336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12,101–12,213 (Supp. V 1993)).

Additionally, it is important to understand the nature of the preaward certifications conducted by the program administration divisions. Each agency chapter states whether the operational divisions only collect assurances or whether they also conduct preaward desk audits. The agency chapters also address whether the operational divisions' Title VI enforcement responsibilities are limited to particular programs and whether they have responsibility for the enforcement of other civil rights statutes.

In addition to understanding the role of operational or program divisions in Title VI enforcement, it is also important to address the role each agency's office of general counsel plays in Title VI enforcement, particularly if the civil rights office does not contain its own legal support. Each agency chapter explains the role of the office of general counsel in approving regulations, writing policies, and in issuing findings of discrimination. Each agency's office of general counsel may also serve as a link between the general policies of the agency and those of the civil rights office.

To enforce Title VI effectively, it is essential that other offices participating in Title VI enforcement receive training from, report to, and are monitored by the agency's civil rights office. Otherwise, the staff functions of ensuring the success of the funding programs and preventing discrimination in such programs become conflicting.

### *Policy and Planning Within the Civil Rights Office*

According to DOJ, the civil rights office should have a unit devoted exclusively to policy and planning related to Title VI and other civil rights enforcement activities. The former Acting Assistant Attorney General stated, "[t]here needs to be a 'critical' mass of expertise and staff resources devoted to external civil rights enforcement, regardless of organizational location. . . . [E]ffective enforcement requires staff with a variety of slots and substantive specialization."[55] Developing civil rights policies, including developing and issuing regulations, guidelines, policy interpretations, and procedures, is a major function of a civil rights enforcement office. These duties cannot be performed by compliance personnel on a part-time basis without drastically diminishing their ability to fulfill their compliance responsibilities. The agency chapters identify whether agencies' have divisions or civil rights staff devoted to Title VI policy and planning.

### *Reorganizations*

The agency chapters also review agency reorganizations and evaluate whether they improve or impede the agency's ability to effectuate civil rights enforcement in federally assisted programs. The chapters address whether reorganization plans consolidate all civil rights programs into a separate office, reporting directly to the Secretary, with units and divisions for each enforcement program. The chapters also critique agency reorganization plans that fail to address the complexity of each civil rights enforcement program by attempting to combine the staff for both internal and external equal opportunity programs. In addition, the chapters address whether agencies have sought or received input and approval from DOJ regarding the effects of their individual reorganization plans on external civil rights enforcement.

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[54] *See* p. 171 for a discussion of preaward reviews.

[55] Turner letter.

### Budget, Staffing, and Workload

DOJ's coordination regulations do not provide much guidance to agencies on their Title VI budget, staffing, or workload. Although DOJ's regulations require agencies to assign "sufficient personnel" to its Title VI compliance program to ensure effective enforcement,[56] DOJ's coordination regulations do not establish minimum staffing or resource levels. Therefore, the agencies are afforded considerable discretion to define "sufficient personnel" in their own Title VI implementation, compliance, and enforcement programs.

The chapters explain whether each agency has an earmarked budget and appropriation for external civil rights enforcement. In addition, the chapters assess increases or decreases in resources available for external civil rights, and particularly Title VI, enforcement. This information is important because it demonstrates whether the civil rights offices are involved in the budget process and whether they must justify their budgets. In addition, it indicates whether funds are designated for achieving particular civil rights enforcement goals or whether the civil rights office only generally receives funding for salaries, office resources, and equipment.

## Process of Agency Title VI Enforcement

Title VI enforcement occurs in several stages and varies based on the type of recipient and the nature of the federally assisted program involved. The Commission focused its survey and analysis on the enforcement of Title VI with respect to primary recipients[57] of Federal financial assistance. The process of agencies' Title VI enforcement depends upon the nature of the federally assisted programs administered. In particular, the process for enforcing Title VI may be different for continuing State and local programs for which State and local governments assume some Title VI enforcement responsibilities than for programs in which the Federal Government agency disburses funds directly to the ultimate recipients or disburses funds indirectly through intermediaries that have no enforcement responsibility. However, a Federal agency's Title VI enforcement process generally contains the following elements, regardless of the nature of its programs:

- preaward reviews
- postaward reviews
- complaint investigations
- identification of deficiencies, remedies, and sanctions
- outreach and education
- technical assistance

DOJ's coordination regulations require that each agency's civil rights office conduct or review all determinations of compliance with Title VI.[58] Moreover, DOJ's guidelines for Title VI enforcement emphasize that the heads of each agency administering Federal financial assistance have the primary responsibility for "prompt and vigorous enforcement of Title VI."[59] To this end, it is essential for each agency to have comprehensive enforcement mechanisms for direct Title VI enforcement and for overseeing and monitoring the enforcement activities delegated either to the agency's own regional and field offices or to State and local recipients.

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[56] 28 C.F.R. § 42.414 (1994).

[57] Any recipient which is authorized or required to extend or distribute Federal financial assistance to another recipient for the purpose of carrying out a program. Any governmental, public or private agency, State, political subdivision of any State, or instrumentality of any State or political sub-division, institution, organization, grantee, subgrantee or other entity or any individual, who or which is an applicant for Federal financial assistance, or to whom Federal financial assistance is extended directly or through another recipient, for or in connection with any program, including any successor, assignee, or transferee of any kind of the recipient, but does not include any person who is an ultimate beneficiary under any such program. Recipient further includes a subgrantee, an entity which leases or operates a facility for or on behalf of a recipient. *See, e.g.*, 34 C.F.R. § 100.13(i), (j) (1995).

[58] 28 C.F.R. § 42.407(a) (1994).

[59] *Id.* § 50.3(b).

The chapters trace each agency's Title VI enforcement process from the application stage through compliance reviews and sanctions. The chapters describe agency-conducted enforcement, as well as enforcement responsibilities conducted by State or local recipients and monitored by the funding agency. Because each agency is ultimately responsible for enforcement of Title VI, it is important to assess both the quality of the process itself and the effectiveness of each agency's oversight and monitoring functions. Moreover, it also is important to review the effects of the various fund disbursement mechanisms on the Title VI enforcement process to determine whether procedures should be developed to meet the specific needs of each disbursement method.

### Preaward Reviews

DOJ's coordination regulations require that recipients of Federal funds provide assurances of Title VI compliance to the funding agency as a condition for receiving Federal financial assistance.[60] Generally, Federal agencies conduct routine checks prior to releasing funds to ensure that recipients have submitted assurance forms.[61] However, Federal agencies also should conduct preaward reviews of recipients to determine whether the recipient's program operates in a discriminatory fashion. A preaward review may be a desk-audit review or an onsite review.[62] Regardless of the type of preaward review, if the agency discovers any violations of Title VI, the agency must attempt to secure the recipient's voluntary compliance; if that attempt fails, the agency has the option of withholding or denying Federal funds.[63]

#### *Preaward Desk-Audit Reviews*

A desk audit is a structured review of compliance information obtained before or without going onsite and conducted according to codified review procedures. In practice, they may be cursory desk inspections of assurance forms supplied by the recipient. However, desk audits *do not include* routine reviews of assurance forms or other documents to ensure that they have been properly completed.[64] They are designed to do more than require an applicant or recipient to provide an assurance compliance form. Agencies are required to review the data submitted by each applicant seeking Federal financial assistance.[65]

DOJ's coordination regulations also state that, if a determination cannot be made from reviewing the data alone, the agency must require the submission of necessary additional information, and must take any other steps necessary to make a determination of compliance with Title VI.[66]

#### *Preaward Onsite Reviews*

Although DOJ allows the agencies great latitude in deciding what other steps may be necessary, DOJ suggests that an agency conduct onsite field reviews or communicate with local government officials and minority group organizations to determine an applicant's compliance with Title VI.[67] An onsite review is an extensive investigation of a recipient's program conducted in the field at program offices.

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[60] *Id.* § 42.407(b).

[61] An assurance compliance form is an agreement in which a recipient legally agrees to administer its programs and services in accordance with Title VI and other civil rights regulations pursuant to the grant agreement, contract or appropriation.

[62] *See* pp. 172–73, for a further discussion of the differences between desk audits and onsite reviews.

[63] *See* DOJ Title VI Checklist, p. 13, no. 30.

[64] *See, e.g.*, James P. Turner, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, memorandum to Civil Rights Directors, "Guidelines for the development of FY 1994 civil rights implementation plans and supporting workload and performance data," Sept. 7, 1993, p. 18 (emphasis in original).

[65] 28 C.F.R. § 42.407(b) (1994).

[66] *Id.*

[67] *Id.*

Preaward reviews are extremely valuable because they allow Federal agencies to deny Federal funding to noncomplying applicants or to require applicants to take corrective action to eliminate discrimination before they are afforded Federal funds. Preaward reviews can also be used to require applicants to take preventive measures to ensure that discrimination will not occur in their programs as a condition of receiving funds. Thus, preaward reviews are essential to preventing Title VI violations before they take their toll on potential beneficiaries and participants. Furthermore, desk-audit preaward reviews serve as an effective means of targeting State or local continuing program recipients that may need technical assistance or more extensive onsite review.

In addition to ensuring that recipients of Federal financial assistance do not discriminate in their programs and activities, preaward reviews can help the Federal agency to evaluate its own compliance with the nondiscrimination principles of Title VI. For example, if Federal agencies disproportionately distribute funds to recipients that operate programs in one part of the country, population groups that are underrepresented in that part of the country may not have equal access to Federal funds. Similarly, if funds are being afforded primarily to recipients whose programs have very similar modes of operation, the population groups that would benefit more from alternative program styles may tend to be excluded from access to Federal funds.

The agency chapters describe and assess each agency's preaward review process. It is important to monitor the quality of agency preaward reviews because they represent a frontline approach to eliminating and preventing discrimination before it occurs. For this reason, each agency chapter addresses whether the agency performs a more extensive preaward review than merely collecting assurances. If the agency employs preaward desk audits, the agency chapters address the number conducted each year, the nature of the material reviewed, and whether the information reviewed varies based on the type of program involved. In addition, each agency chapter explains the outcomes of the reviews and whether the agency uses the information to target recipients for technical assistance or onsite investigation.

### Postaward Reviews

Once a recipient has received Federal funds, DOJ regulations require the Federal agency to review the recipient periodically to ensure that the recipient remains in compliance with Title VI. Specifically, the regulations state:

> Federal agencies shall establish and maintain an effective program of post-approval compliance reviews regarding approved new applications, applications for continuation or renewal of assistance and all other federally assisted programs. Such reviews are to include periodic submission of compliance reports by recipients to the agencies and, where appropriate, field reviews of a representative number of major recipients.[68]

Thus, postaward reviews can either take the form of desk-audit reviews or more extensive onsite compliance reviews. The results of the postaward reviews must be in writing and must include specific findings and recommendations, with a determination of compliance status made as promptly as possible.[69]

#### *Postaward Desk-Audit Reviews*

Desk-audit reviews are an important means of detecting possible discrimination among recipients, as well as targeting recipients who may need technical assistance. The quality of a desk-audit review will depend on the reporting requirements imposed on recipients by the Federal agency. Therefore, an agency's data collection requirements and activities will influence whether it conducts desk-audit reviews as part of its Title VI enforcement program. DOJ suggests that each agency perform its Title VI desk-audit reviews as a component of the general program reviews and audits. A Title VI desk-audit review can be accomplished with less staff time than an onsite compliance review, which may not be conducted as part of a general program review. Hence, an agency can perform more postaward desk-audit reviews and examine the compliance status of more recipients in a fiscal year than by onsite compliance reviews. Postaward desk-audit reviews are a cost-effective means of discovering potential Title VI violations. Furthermore, if recipients believe that they are likely targets of a postaward desk-audit review, they are more likely to implement voluntary measures to ensure program compliance with Title VI. Hence, a program of postaward desk-audit reviews may reduce the number of recipients in violation of Title VI. Postaward desk-audit reviews have limitations, however, in that they may not detect all discriminatory practices, and they may have to be supplemented with onsite investigations for an agency to make findings of noncompliance.

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[68] *Id.* § 42.407(c).

[69] *Id.* § 42.407(c)(2).

### *Postaward Onsite Reviews*

As discrimination may not always be overt and therefore may be more difficult to identify, onsite compliance reviews have become an increasingly important means of discovering discriminatory practices. In fact, DOJ's coordination regulations require agencies to conduct "field reviews of a representative number of major recipients."[70] A postaward onsite compliance review is an indepth examination of a recipient's entire program. Onsite compliance reviews are conducted periodically and are referred to as "regular, systematic inspections."[71] A quality compliance review requires substantial amounts of resources and staff time. However, it is more likely to identify deficiencies or violations that are not revealed by preaward reviews or desk-audit reviews. In addition, it deters discrimination and encourages accurate recordkeeping techniques, particularly if agencies conduct sufficient numbers of onsite reviews and applicants remain subject to a review at any time. Onsite compliance reviews also demonstrate the proactive resolve of a Federal agency to eliminate discrimination. Finally, onsite reviews afford an excellent opportunity for agencies to provide education and technical assistance to reviewed recipients. As such, DOJ's Title VI Checklist demands periodic onsite reviews of recipients for an effective agency Title VI enforcement program.[72] As with desk audits, agencies are required to issue written findings and determinations of Title VI compliance after completing an onsite review.[73] To facilitate the compliance review, the recipients are required to keep and submit records for review, as well as provide access to these records for agency staff.[74]

The agency chapters describe the postaward desk-audit and onsite compliance review processes for each agency. Each agency chapter states how many desk awards were conducted by each agency over the years and how many findings of discrimination were issued. The agency chapters discuss which branch of the agency conducts the audit, what information and data are collected, and whether the audits vary depending upon the program reviewed. This information is important because it demonstrates whether Federal agencies rely on passive and reactive enforcement methods, such as routine reviews of assurance forms or complaint inquiries, having largely abandoned proactive methods, such as onsite compliance reviews and full complaint investigations.

### Complaint Investigations

In addition to periodic postaward desk-audit and onsite compliance reviews, Federal agencies should investigate recipients against whom they have received complaints alleging violations of Title VI or other Federal civil rights statutes. Depending on the nature of the complaint, an investigation can be a cursory desk-audit review or a more extensive, onsite review.[75] It is important, however, that agencies' complaint investigations be prompt, thorough, and based upon current judicial, administrative, and legislative interpretations of Title VI.

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[70] *Id.* § 42.407(c)(1).

[71] *See Compliance Officer's Manual*, p. 10.

[72] DOJ Title VI Checklist, p. 13, no. 33.

[73] 28 C.F.R. § 42.407(c)(2) (1994).

[74] *Compliance Officer's Manual*, 7.3, p. 14.

DOJ's coordination regulations require agencies to have published procedures for investigating complaints.[76] DOJ requires each agency to investigate all meritorious complaints or to provide a good cause reason why the investigation cannot be completed, and to ascertain the feasibility of referring the complaint to a primary recipient for investigation.[77] If a Federal agency allows its primary recipients, such as State agencies, to investigate complaints, it must require that the primary recipients submit a written report on each complaint and its investigation.[78] The agency must ensure that the recipients' procedures are adequate and must maintain a review authority over the investigation and disposition of the complaints.[79]

Although neither Title VI nor DOJ imposes a statute of limitations for filing a complaint, the Commission's *Compliance Officer's Manual* states that complaints must be filed within 90 days of the alleged discriminatory practice unless otherwise extended by the agency.[80] This provides the agency with great latitude to determine the time for filing and investigating Title VI complaints of discrimination.

The agency chapters describe and assess each agency's complaint investigation process. This assessment is particularly important because some agencies rely exclusively on complaints to enforce Title VI. Each agency chapter states the number of complaints received and investigated, the number of findings issued, the number of no cause findings, and how the cases were resolved. The agency chapters explain whether investigations are conducted in headquarters, in the regions, or by recipients, and whether the agency has imposed complaint processing deadlines on its staff. In addition, each agency chapter depicts the basis of the complaints and the methodology used to investigate them. The agency chapters also address whether the complaints were ultimately litigated by DOJ[81] or resolved internally.

### Deficiencies, Remedies, and Sanctions

A Federal agency may determine, after the completion of a preaward or postaward desk-audit review, compliance review, or complaint investigation, that a recipient is not in compliance with Title VI. Deficiencies can take the form of technical violations, such as failing to include an equal opportunity statement on a poster or filling out an assurance form incorrectly, or, more serious, overt discriminatory practices that have the effect of denying equal access to program funds. If the Federal agency finds deficiencies, it must notify the recipient of the deficiency or deficiencies and attempt to obtain voluntary compliance.[82] DOJ emphasizes that the objective should be "to secure prompt and full compliance so that needed Federal assistance may commence or continue."[83]

The agency chapters describe and assess each agency's methods for resolving deficiencies in recipient programs. When available, the agency chapters state the number of findings of discrimination per year and the number of voluntary compliance agreements obtained by the agency. The agency chapters also reflect whether the agencies focus primarily on technical deficiencies, such as failing to print an equal opportunity line on a poster or completing incorrectly an assurance form, or whether the agencies detect discriminatory practices that have the effect of denying equal access to or benefit of program funds.

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[75] *See Compliance Officer's Manual*, pp. 11–15.

[76] 28 C.F.R. § 42.408(a) (1994).

[77] *Id.*

[78] *Id.* § 42.408(c).

[79] *Id.*

[80] *Compliance Officer's Manual*, p. 9.

[81] *See* chapter 3, pp. 109–11, for a discussion of DOJ's role in litigating Title VI complaints.

[82] 42 U.S.C. § 2000d-1 (1988).

[83] 28 C.F.R. § 50.3(a) (1994).

This information is important because it addresses whether the Federal agencies have sufficient procedures for discovering deficiencies, negotiating voluntary compliance, and providing remedies and sanctions if voluntary compliance efforts fail. In addition, this information reveals whether the type and scope of the federally assisted program itself affects the types of compliance or remedies achieved. Although the use of voluntary agreements is an important tool for effecting compliance under Title VI, total reliance on this mechanism by the Federal agencies, to the exclusion of administrative sanctions, appears to have seriously diminished their overall enforcement effectiveness and credibility.

In the event that compliance cannot be achieved voluntarily, Title VI provides other means to secure compliance. It permits Federal agencies to use "any other means authorized by law" to bring about compliance.[84] The phrase "any other means authorized by law" has been interpreted primarily to include referral to DOJ for litigation in Federal court.[85] However, other administrative avenues may be available. To clarify the administrative process in the case of noncompliance, DOJ issued guidelines for Title VI enforcement.[86] These guidelines provide for:

> 1) seeking consultation with or assistance from another Federal agency (such as the Office of Federal Contract Compliance at the Department of Labor) having the authority to enforce nondiscrimination requirements;
> 2) consulting with or seeking assistance from State or local agencies having nondiscrimination enforcement authority;
> 3) bypassing the central agency applicant to obtain assurances from, or to grant assistance to, complying local agencies; and
> 4) bypassing all noncomplying non-Federal agencies to provide assistance directly to complying ultimate beneficiaries.[87]

Title VI also provides one other sanction in the event that a Federal agency cannot obtain voluntary compliance or compliance by other means. An agency may refuse to grant or may terminate funds after notice and an opportunity for a hearing.[88] Title VI further provides that if the agency determines, after completion of the hearing, that funds should be terminated, denied, or discontinued, the agency must submit a complete written report on its decision to the House and Senate committees having legislative jurisdiction over the program or activity before the decision can be implemented.[89]

DOJ's guidelines provide procedures for conducting fund termination or denial hearings. They also permit, in limited circumstances, a Federal agency to defer action on an assistance application temporarily pending initiation and completion of the notice and hearing.[90] Such temporary suspension of funds allows agencies to prevent the continuation of the alleged discrimination pending a final determination.

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[84] 42 U.S.C. § 2000d-1 (1988).

[85] *See* Stewart Oneglia, Chief, Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, interview in Washington, D.C., Feb. 1, 1994, p. 5.

[86] 28 C.F.R. § 50.3(c) (1994).

[87] *Id.* § 50.3, note I. B. 2.

[88] 42 U.S.C. § 2000d-1 (1988).

[89] *Id.*

The Commission's *Compliance Officer's Manual* summarizes the steps that a Federal agency must follow to issue an order suspending, terminating, or refusing to grant or continue Federal financial assistance:

> 1) The agency must advise the applicant or recipient of the failure to comply and of the agency's determination that compliance cannot be secured by voluntary means;
> 2) There must be an express finding on the record of a failure to comply after opportunity for hearing;
> 3) There must be approval of the action terminating, suspending, etc., the Federal assistance by the head of the agency; and
> 4) Thirty (30) days must have expired after the head of the agency has filed, with the Congressional committees having jurisdiction over the program involved, a full written report of the circumstances and grounds for such action.[91]

Fund termination, suspension, and denial can deter recipients from failing to comply with Title VI.

The agency chapters state whether the agencies have sought fund termination and describes the situations that surrounded the actions. In addition, each chapter explains the agency's termination process.

Information on the frequency of fund terminations would indicate whether the threat of termination alone is sufficient to obtain voluntary compliance or whether agencies do not pursue the sanction because of the cumbersome congressional notification requirement. The use of fund termination, suspension, and denial would have potentially broad impact on the beneficiaries and affected communities.

### Community Outreach and Public Education

The primary purpose of community outreach and public education is to inform funding recipients of the obligations imposed on them by Title VI and to inform actual and potential participants and beneficiaries of the rights afforded them by Title VI. Without regular and comprehensive outreach and education, members of the public generally do not have the information necessary to pursue and protect their rights under Title VI by filing complaints against discriminating recipients. Hence, one sign of a poor outreach and education program may be a small number of complaints filed with a funding agency.

Outreach and education efforts also afford agencies an opportunity to inform potential recipients of assistance programs and the nondiscriminatory policies and requirements of Title VI. They also enable potential recipients to learn the procedures for applying for grants. By conducting community outreach and public education, agencies also learn of affected community concerns and receive public input in the development of Title VI enforcement programs. Agencies are also enabled to maintain liaison with affected public interest groups and community organizations.

DOJ's coordination regulations delineate certain minimum requirements for agencies' outreach and education efforts. They specify that the agencies must "make available and, where appropriate, distribute their Title VI regulations and guidelines for use by Federal employees, applicants for Federal assistance, recipients, beneficiaries, and other interested persons."[92] The regulations primarily afford the responsibility for public dissemination of Title VI information to the funding recipients. Recipients must display posters that state the recipient's nondiscrimination policy and compliance with Title VI, summarize the requirements of Title VI, note the availability of Title VI information from the recipient and the

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[90] 28 C.F.R. § 50.3, note I. A. Temporary suspension of funds is ordinarily only permissible with respect to applications for non-continuing assistance or initial applications for continuing assistance. It is not available when the Federal financial assistance is due and payable pursuant to a previously approved application, or when the assistance must be distributed pursuant to specific legislation containing its own nondiscrimination enforcement provisions. *Id.*

[91] *Compliance Officer's Manual*, pp. 8–9.

[92] 28 C.F.R. § 42.405(a) (1994).

Federal funding agency, and explain briefly the procedures for filing a complaint.[93] DOJ's regulations also require the use of other forms of public distribution, such as pamphlets, handbooks, manuals, and the use of the print or broadcast media.[94]

DOJ's coordination regulations require recipients to provide outreach and education to persons with limited English proficiency. DOJ requires that, when a significant number of beneficiaries, potential beneficiaries, or the affected community require information in a language other than English, the recipient must take reasonable measures to disseminate written material in the appropriate languages.[95] Similarly, DOJ requires Federal agencies to take reasonable steps to provide, in languages other than English, information on federally assisted programs subject to Title VI.[96]

The agency chapters describe each agency's requirements for dissemination of Title VI and program information. They state how the agencies handle their own public outreach obligations under Title VI, as well as how the agencies ensure that recipients abide by the public outreach and education requirements. The agency chapters focus particular attention on the types of information provided, the form used to disseminate the information, and whether the information is provided in languages other than English when necessary. They also state whether the agencies or recipients conduct seminars or meet with community organizations.

### Technical Assistance

Although not required explicitly by DOJ's coordination regulations, DOJ encourages Federal agencies to provide civil rights technical assistance and training to recipients. Technical assistance may take the form of providing sample grant applications, explaining procedures for data collection, helping recipients to establish an advisory board, or conducting workshops and conferences for both recipients and beneficiaries.[97] It also affords agencies another opportunity to inform the general public of their federally assisted programs.

Providing technical assistance is an important method for preventing discrimination in programs that are already utilizing Federal funds. Technical assistance enables an agency not only to respond to specific concerns of recipients, but also to offer assistance proactively when deficiencies are detected in a recipient's application or existing program during a desk-audit review, or when new developments warrant changes in recipients' procedures.[98]

In addition to eliminating discrimination, agencies use technical assistance to reduce costs for both the agency and recipients.[99] By offering technical assistance to secure voluntary compliance, agencies may be able to reduce the need for costly compliance reviews. Recipients also benefit from technical assistance when Federal agencies are able to suggest the most cost-effective method for eliminating discrimination in recipient programs.[100] If several recipients require similar assistance, an agency may discover that it needs to redesign its procedures or regulations to prevent further problems in that particular aspect of the

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[93] *Id.* § 42.405(c).

[94] *Id.*

[95] *Id.* § 42.405(d)(1).

[96] *Id.* § 42.405(d)(2).

[97] *See* U.S. Department of Justice, Civil Rights Division, "Federal Technical Assistance Aids Recipients," *Civil Rights Forum*, vol. 7, no. 3 (Summer/Fall 1984), p. 11.

[98] Ibid.

[99] Ibid.

[100] Ibid.

Title VI enforcement requirements. Most important, technical assistance is an important method by which to prevent discrimination in programs that have already received Federal funds. Strong technical assistance programs allow Federal agencies to work with recipients to prevent and correct voluntarily any violations of Title VI that may exist in a recipient's program.[101]

Each agency chapter states whether the agency provides technical assistance, the type of assistance provided, the subjects of the assistance, to whom the assistance is offered, whether the assistance is offered or provided only when requested by the recipient, and which agency staff provides the assistance. Each agency chapter also describes the content and quality of any training sessions conducted by the Federal agency for recipients, beneficiaries, or the affected community. This information can reveal whether agencies use technical assistance proactively to prevent discrimination in federally assisted programs.

## Federal Agency Oversight of Continuing State Programs

### Oversight and Monitoring

Rather than providing funds directly to the ultimate recipients, many Federal agencies provide Federal financial assistance through continuing programs to State agencies, which, in turn, disburse funds to subrecipients.[102] In these instances, the State or local agency is responsible not only for enforcing Title VI with respect to subrecipients or subgrantees,[103] but also for assessing its own Title VI compliance efforts. The Federal agency's primary function is to oversee and monitor Title VI enforcement as conducted by the recipient State or local agency.[104]

DOJ's coordinating regulations require States receiving Federal assistance through continuing State programs to establish a Title VI compliance program for themselves and their subrecipients.[105] Furthermore, the regulations direct the responsible Federal agency to require States to designate responsible officials, to comply with certain minimum standards, such as providing methods of administration to the agency, and to maintain such records as necessary to permit the Federal agency to determine the States' and their subrecipients' compliance with Title VI.[106]

Although, in effect, the State agencies are responsible for Title VI enforcement in the continuing Federal financial assistance programs they administer, the Federal funding agencies remain ultimately accountable for ensuring nondiscrimination in such programs. For this reason, each Federal agency providing funds to State or local primary recipients must monitor the quality of the Title VI enforcement conducted by the recipients and provide assistance whenever possible.

To monitor State or local recipients effectively, each agency must evaluate the recipients' civil rights enforcement programs to ensure that they execute their methods of administration properly. Methods of administration are plans that State and local recipients are required to develop to outline the procedures they intend to employ to meet their Title VI enforcement responsibilities. As the surveys indicate, many Federal agencies refer to this process as a "compliance review" of the State or local agency. However, these reviews are more analogous to performance evaluations. The State and local recipients are responsible for conducting the Title VI compliance reviews of the ultimate recipients that manage the Federal agencies' programs. The Federal agencies ensure that State and local recipients adequately perform such reviews, as well as all other implementation and enforcement procedures.

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[101] Ibid.

[102] *See id.* § 42.410; 34 C.F.R. Part 100, Appendix A, "Federal Financial Assistance to Which These regulations Apply," Part 2, "Continuing Assistance to State-Administered Programs" (1994).

[103] Subrecipients and subgrantees refers to any recipients of federally assisted programs who receive assistance through an intermediate recipient entity, rather than directly from the Federal agency. Subrecipients and subgrantees typically refers to political subdivisions or agencies of State recipients, and public or private agencies, organizations, or institutions. However, this does not include any ultimate beneficiary of a federally assisted program. *See* 34 C.F.R. § 100.13(i) (1994).

[104] *See* 28 C.F.R. § 42.410 (1994).

[105] *Id.* § 42.410.

[106] *Id.*

Just as the Federal agencies are required by DOJ to collect and maintain data on their recipients,[107] State and local primary recipients administering Federal assistance programs must collect and maintain data on their potential and actual subrecipients and sub-grantees, beneficiaries, and affected communities.[108] Therefore, it also is the Federal agency's role to monitor this data collection process and ensure that the State and local agencies are maintaining sufficient records on their subrecipients and ultimate beneficiaries.[109]

The agency chapters demonstrate whether agencies monitor Title VI enforcement activities conducted by State and local agencies administering Federal financial assistance to subrecipients. Although the agency chapters do not assess the quality of the State or local enforcement efforts, they do evaluate the mechanisms used by the Federal agencies to monitor their primary recipients. The agency chapters also describe and assess the arrangements between Federal agencies and the State and local recipients responsible for administering agencies' federally assisted programs.

### Methods of Administration

The Commission's *Compliance Officer's Manual* delineates State and local recipients' Title VI enforcement and compliance responsibilities. It requires State and local recipients operating continuing programs to provide "methods of administration" designed to ensure that they and all subrecipients comply with Title VI and remedy any existing compliance problems.[110] At a minimum, the *Compliance Officer's Manual* recommends that the methods of administration include the following five components:

> 1) a specific public outreach and education plan for notifying beneficiaries and potential beneficiaries, through public statements, written documents, meetings with community organizations and the media, of the Title VI requirements that apply to the federally funded State program.[111]
>
> 2) training for State or local program staff, subrecipients, and beneficiaries or potential beneficiaries in the Federal agency's nondiscrimination policies and procedures.[112]
>
> 3) procedures for processing complaints, notifying the Federal funding agency, and informing beneficiaries of their right to file a complaint.[113]
>
> 4) a program to assess and report periodically on the status of their Title VI compliance that goes beyond a mere checklist of activities and assurances.[114]
>
> 5) detailed plans for bringing discriminatory programs into compliance within a specified time period.[115]

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[107] *See* pp. 180–81, for a further discussion on data collection and reporting requirements.

[108] 28 C.F.R. § 42.410 (1994).

[109] *Id.*

[110] *Compliance Officer's Manual*, p. 6.

[111] Ibid., p. 6.

[112] Ibid., p. 7.

[113] Ibid.

[114] Ibid.

[115] Ibid.

Although all recipients, public or private and direct or State, should provide agencies with methods of administration, it is particularly important for State and local agencies to submit such documents when they are responsible for conducting enforcement procedures, such as preaward desk audits, complaint investigations, self-assessments, and postaward compliance reviews.

By examining recipients' methods of administration, funding agencies can determine whether there is sufficient accountability for the actions of recipients and subrecipients to ensure compliance with Title VI. If a Federal agency plans to delegate or rely on State or local agencies to implement and enforce Title VI, then it is essential that the Federal agency require, in its regulations, State or local recipients to demonstrate compliance by regularly submitting comprehensive methods of administration.

The agency chapters describe and assess the content of the methods of administration. They also explain whether the agencies tailor methods of administration to correspond with specific funding program needs. For example, the Department of Labor provides separate procedures for methods of administration under its Job Training Partnership programs. Because the Commission has not reviewed the State and local programs from the field, the agency chapters are limited to discussing agencies' requirements of State and local recipients and agencies' success in monitoring recipients' compliance with those requirements. The agency chapters state whether there is an official delegation of responsibility or agreement with State agencies, or whether State or local involvement is simply a common practice for the agency. The agency chapters also address the chain of accountability to determine the extent to which Federal agencies and State or local recipients are responsible for effectuating Title VI enforcement.

## Staff Training

The quality of an agency's civil rights program depends upon the expertise of the staff conducting it. For this reason, it is essential that each agency provide regular and comprehensive training in Title VI enforcement to all headquarters and field office staff responsible for external civil rights compliance, including the agency's program administration staff.[116] Effective staff training programs not only provide education on Title VI compliance and enforcement policies and procedures, but also ensure that the civil rights staff understand the relationship between Title VI and other civil rights statutes. Effective training also keeps staff apprised of legal developments affecting Title VI, including new civil rights laws. Furthermore, it is equally important for the civil rights staff to understand the agency's federally assisted programs and the necessary nexus between program objectives and civil rights obligations. Agencies may also use staff training to improve the staff's ability to conduct enforcement activities, such as investigations and compliance reviews, and to identify subtle forms of discrimination.

The agency chapters describe the frequency and content of each agency's staff training program. Each agency chapter explains whether agency staff are trained specifically in Title VI or whether they receive only general civil rights training. This information is important because it reveals whether the agency staff assigned to external civil rights enforcement remain current on policies and laws affecting their Title VI responsibilities.

## Data Collection and Reporting Requirements

The collection and analysis of data on recipients are key elements of a successful Title VI enforcement strategy. Data collection is the primary means by which an agency can monitor whether its program funds are reaching the communities that need the assistance. Monitoring is essential to achieve more than token compliance. However, monitoring is more likely to produce desired changes in civil rights enforcement when there are quantifiable standards with which to measure performance. To be effective, monitoring requires the collection of data. When the monitoring agency can numerically assess the reach of its program funds, the agency is in a better position to assess whether corrective action is necessary to ensure nondiscrimination. This information may be used in all stages of the compliance process and may assist in developing strategies for case analysis and Title VI testing.

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[116] *See* DOJ Title VI Checklist, p. 11, nos. 19–21.

DOJ's coordination regulations require Federal agencies to implement a system of data and information collection. Specifically:

> [F]ederal agencies . . . shall in regard to each assisted program provide for the collection of data and information from applicants for and recipients of federal assistance sufficient to permit effective enforcement of Title VI.[117]

DOJ directs each agency to provide specific examples of the type of data that applicants and recipients are required to collect and maintain. The applicants and recipients are directed to collect the following data and information:

- the manner in which services are provided by the program;
- the race, color, and national origin of the population eligible to be served;
- data regarding covered employment, including the use of bilingual employees to work with beneficiaries who do not speak English;
- the location of existing or proposed facilities and information regarding whether the location will have the effect of denying access to any person on the basis of prohibited discrimination;
- the race, color, and national origin of the members of any planning or advisory body that is an integral part of the program; and
- requirements and procedures designed to guard against unnecessary impact on persons on the basis of race, color, or national origin when relocation is involved.[118]

Agencies are authorized to include demographic information regarding racial composition when it is necessary or appropriate.[119] Agencies must also require that applicants and recipients notify the agency upon request of any lawsuits filed against the applicant or recipient alleging discrimination.[120] The agency guidelines also must require applicants and recipients to provide a brief description of any applications pending at other Federal agencies, a statement describing any compliance reviews conducted in the prior 2 years, and a written assurance that they will compile and maintain records pursuant to the data collection guidelines.[121] The Commission's *Compliance Officer's Manual* explains that data collection is important because "patterns of discrimination may be revealed by statistical analyses of records maintained by agencies."[122]

The agency chapters review each agency's data collection guidelines to ensure compliance with these specific requirements. The chapters also describe any agency guidelines that go beyond the scope of these minimum requirements to include other important data or information. The chapters explain the system each agency uses to analyze the data and how it uses the information to ensure compliance with Title VI. In addition, the agency chapters describe how each agency complies with the data collection requirements provided for in its guidelines.

## Strategic Planning and the Civil Rights Implementation Plans

DOJ's coordination regulations require each Federal agency to submit a written Title VI enforcement plan for DOJ's approval.[123] An enforcement plan is a detailed plan setting forth the agency's goals and priorities for the coming year and allocating specific staff and resources to specific tasks, to accomplish the agency's objectives.[124] It should provide each agency's civil rights office the opportunity to institute a program planning system that will enable the office to monitor regional, field, and State activities. The overall plan often includes goals and objectives for conducting outreach, education, and technical assistance, and for initiating compliance reviews, investigating complaints, and providing staff training. The enforcement plan is an essential tool for linking enforcement goals and priorities with the budgeting process.

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[117] 28 C.F.R. § 42.406(a) (1994).

[118] *Id.* § 42.406(b).

[119] *Id.* § 42.406(c).

[120] *Id.* § 42.406(d)(1).

[121] *Id.* § 42.406(d)(2)–(4).

[122] *Compliance Officer's Manual*, p. 10.

The plan should be available to the public and should establish the agency's Title VI enforcement priorities and procedures.[125] DOJ requires agencies' plans to address the methods for choosing recipients for compliance reviews, to establish timetables for compliance reviews, to explain the procedures for handling complaints, to describe the allocation of staff to compliance functions, to develop guidelines or provide an explanation when guidelines are not appropriate, and to include provisions for civil rights training of agency staff.[126]

In practice, the Federal agencies submit Civil Rights Implementation Plans to DOJ in lieu of enforcement plans.[127] Unlike enforcement plans that address only Title VI activities, implementation plans address each agency's responsibilities under all the civil rights statutes covered by Executive Order 12,250. The Civil Rights Implementation Plans were designed so that agencies could use them as a "planning tool," as well as an "informational tool," and a "reporting tool."[128] DOJ directed each agency to prepare its 1994 Civil Rights Implementation Plans as a "base-year" plan covering fiscal years 1994–1997.[129] The plans submitted each year after 1994 are intended only to update the 1994 base-year plan.

The Civil Rights Implementation Plans serve three purposes. They are intended to assist DOJ in its oversight of the agencies' external civil rights enforcement, to function as a management tool to help the agencies in planning their civil rights activities,[130] and to serve as a source document for the general public.[131] To serve these purposes, DOJ's guidelines provide the agencies with specific instructions for the preparation of the Civil Rights Implementation Plans.[132]

As outlined by DOJ, each plan should begin with a narrative section providing an overview of the agency's civil rights enforcement program, including information on the mission, authority, covered programs, organization, staff and resources, and approach to civil rights enforcement activities.[133]

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[123] 28 C.F.R. § 42.415 (1994).

[124] *See id.*

[125] *Id.*

[126] *Id.*

[127] *See* U.S. Department of Justice, Civil Rights Division, "AAG Approves Implementation Plans," *Civil Rights Forum*, vol. 6, no. 1 (Fall 1982), p. 10. DOJ refers to the Civil Rights Implementation Plans as successors to the Title VI enforcement plans. Ibid.

[128] Allen Payne, Director of Program Compliance, Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, interview in Washington, D.C., Feb. 2, 1994, p. 5 (hereafter cited as Payne interview).

[129] James P. Turner, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, memorandum to Civil Rights Directors, "Guidelines for the development of FY 1994 civil rights implementation plans and supporting workload and performance data," Sept. 7, 1993 (hereafter cited as DOJ Guidelines for FY 1994 implementation plans).

[130] *See* Payne intervie, p. 5.

[131] 28 C.F.R. § 42.415 (1994)

[132] DOJ has issued guidelines for implementation plans periodically since the early 1980s. The last guidelines were issued in 1993, and apply to agency civil rights enforcement programs for FY 1994 through FY 1997. *See* DOJ Guidelines for FY 1994 implementation plans. For a further discussion of the DOJ guidelines for implementation plans, see chap. 3.

A second part of the plan should establish the agency's long-range policy goals, defined as "those ultimate purposes or 'ends' for which the program exists."[134] These long-range goals should serve as a framework for formulating more specific "major" and "short-term" objectives, or "means" to achieving the long-range goals.[135] For example, a long-range goal is "to maximize the number of recipients in compliance with civil rights requirements through a preventive program of outreach, technical assistance, and monitoring."[136]

DOJ's guidelines also require agencies to formulate major objectives that serve as "strategies" for achieving the "desired ends or purposes of legislation and other policy and program thrusts."[137] Major objectives "imply criteria for measuring accomplishments."[138] DOJ requires that major objectives be related "clearly and directly to the long-range goals to which they will contribute" and specifies that agencies should have at least one major objective in each of the following enforcement areas: complaint processing, preaward review, postaward review, enforcement monitoring, routine monitoring, legal and administrative support, staff training, and technical assistance.[139] Major objectives include an intention to "plan, design, and implement a compliance strategy for programs" funded under a particular statute.[140]

DOJ also requires each agency to include a progress report to describe its success in achieving its long-range goals and major objectives established in its base-year plan.[141] The progress reports should "relate the discussion of individual activities to the achievement of specific long-range goals and major objectives that were described in the previous base-year plan."[142]

Agencies are also required to submit short-term objectives that translate major objective strategies into specific work activities that are normally completed within one fiscal year.[143] DOJ indicates that each major objective will have at least one short-term objective. Each short-term objective should be accompanied by the corresponding major objective and long-range goal, the priority order of the short-term objective, the estimated start and completion dates, and a statement of the expected work product.[144]

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[133] DOJ Guidelines for FY 1994 implementation plans, pp. 1–6.

[134] Ibid., p. 6.

[135] Ibid.

[136] Ibid. DOJ has indicated in earlier guidelines that long-range goals include eliminating backlogged civil rights complaints, such as those carried over for 180 days with no action. *See* U.S. Department of Justice, "Guideline for Agency Implementation Plans Required by Executive Order 12,250, 'Leadership and Coordination of Nondiscrimination Laws,'" p. 11 (undated).

[137] DOJ Guidelines for FY 1994 implementation plans, p. 6.

[138] Ibid.

[139] Ibid., p. 7.

[140] Ibid., p. 6. DOJ has indicated in earlier guidelines that major objectives include an intention to "close 90 percent of all simple and 50 percent of all complex backlogged cases" by the end of a designated fiscal year. *See* U.S. Department of Justice, "Guideline for Agency Implementation Plans Required by Executive Order 12,250, 'Leadership and Coordination of Nondiscrimination Laws,'" p. 11 (undated).

[141] DOJ Guidelines for FY 1994 implementation plans, p. 7.

[142] Ibid.

[143] Ibid., p. 8.

DOJ also requires that each Civil Rights Implementation Plan contain workload and performance data on agencies' complaint processing, preaward and postaward reviews, and other enforcement activities.[145] To assist agencies in fulfilling this requirement, DOJ provides the agencies with blank forms requesting the specific data required.[146]

The agency chapters describe the contents of each agency's implementation plan and assess the adequacy of the information provided. In addition, the agency chapters compare the goals and priorities from year to year to determine whether each agency accomplished its goals and corrected prior deficiencies. If an agency has not achieved its goals, the agency chapter evaluates the factors contributing to the agency's failure.

This information provides insight into an agency's civil rights priorities and whether those priorities are shifted to accommodate changes in civil rights laws. The agency chapters reveal occasions when new civil rights laws have the support of the present administration, and whether the agency officials tend to alter priorities, thereby make enforcing established civil rights statutes subordinate to the new programs. The agency chapters also review selected agencies' implementation plans and DOJ's analyses of those plans to determine significant decreases in resources and staffing, policy development, procedure implementation, or enforcement efforts. This information is also significant because it enables each agency to measure its accomplishments against its objectives and to determine what revisions are necessary to improve its Title VI enforcement program.

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[144] Ibid., p. 8. DOJ has indicated in earlier guidelines that short-term objectives include developing a rating system which can be used to classify the difficulty level of cases, or developing a system for monthly review of status reports on investigations and resolution of complaints. *See* U.S. Department of Justice, "Guideline for Agency Implementation Plans Required by Executive Order 12,250, 'Leadership and Coordination of Nondiscrimination Laws,'" p. 11 (undated).

[145] Ibid., p. 8.

[146] Ibid., pp. 10–24.

## Chapter 5

# U.S. Department of Education

The U.S. Department of Education (DOEd) provides Federal financial assistance of approximately $31 billion to nearly 24,000 recipients through 230 separate programs.[1] Its recipients include 52 State education agencies, approximately 15,000 local education agencies, 3,500 colleges and universities, and approximately 4,000 proprietary schools.[2] DOEd's total civil rights budget is $56.6 million, and in 1994 it had 821 civil rights staff working on the enforcement of Title VI of the Civil Rights Act of 1964[3] and other civil rights statutes pertaining to its federally assisted and federally conducted programs.[4]

## DOEd's Federally Assisted Programs

DOEd's Federal financial assistance is distributed to its ultimate beneficiaries in several ways. First, DOEd funds programs that are administered primarily by States. For example, DOEd provides Federal financial assistance to State education agencies under two of its largest assistance programs: Title I and Title VI of the Elementary and Secondary Education Act of 1965, as amended.[5] The Title I program gives State and local education agencies funds, roughly $5 billion annually, to support compensatory educational services to educationally disadvantaged students.[6] Title I funds are distributed on the basis of a formula.[7] Title VI funds are distributed to promising State and local educational programs.[8] DOEd also administers a number of other programs that provide funds to State education agencies, including vocational and adult education grants[9] and migrant education grants.[10]

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[1] U.S. Department of Education, "Fiscal Year 1994 Civil Rights Implementation Plan," Workload and Performance Data, p. 30 (hereafter cited as DOEd FY 1994 Implementation Plan).

[2] Ibid. Proprietary schools are privately owned and operated.

[3] Pub. L. No. 88–352, 78 Stat. 252 (codified as amended at 42 U.S.C. §§ 2000d to 2000d–7 (1988)).

[4] U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Education, Qs. 35 and 36, pp. 23–24 (hereafter cited as DOEd Survey). *See also* Office for Civil Rights, U.S. Department of Education, 1994 Budget and Staffing Information, provided to the U.S. Commission on Civil Rights on Sept. 12, 1994, by Jeanette Lim, Director, Policy, Enforcement, and Program Service, Office for Civil Rights, U.S. Department of Education (hereafter cited as OCR 1994 Budget and Staffing Information). The number of staff members represents the average number of FTE's actually on staff in 1994, which is a figure less than the number of FTE's authorized in DOEd's budget. Jeanette Lim, Director, Policy, Enforcement, and Program Service, Office for Civil Rights, U.S. Department of Education, and Karl Lahring, Deputy Assistant General Counsel, U.S. Department of Education, interview in Washington, D.C., Apr. 25, 1995 (hereafter cited as Lim and Lahring interview).

[5] Pub. L. No. 103–382, 108 Stat. 3518 (codified as amended in scattered sections of 20 U.S.C.).

[6] U.S. Department of Education, *Guide to U.S. Department of Education Programs* (undated), p. I (hereafter cited as *Guide to DOEd Programs*).

[7] Ibid., p. 1. The formula is calculated on the number of children aged 5 to 17 in the school district from families below the poverty level and the State's average per pupil expenditure as compared to the national average.

Second, DOEd funds a range of programs operated by local education agencies. For example, the Magnet Schools Assistance Program helps local education agencies establish magnet schools that are part of an approved desegregation plan.[11] DOEd's Office of Bilingual Education and Minority Languages Affairs also provides grants to local education agencies to support a variety of instructional programs for students with limited English proficiency.[12]

Third, DOEd funds higher education through assistance to institutions of higher education, through grants and loans to students, and through research grants.[13] Finally, DOEd operates a number of other assistance programs in such areas as Indian education, international education, drug prevention, programs for the improvement of educational practice, library programs, and special education.[14]

## Organization, Budget, Staffing, and Workload of DOEd's Civil Rights Enforcement Function

### Organization

The office responsible for civil rights enforcement at DOEd is the Office for Civil Rights (OCR).[15] OCR is headed by an Assistant Secretary for Civil Rights, who reports organizationally to the Deputy Secretary of Education,[16] but reports directly to the Secretary of Education for most matters.[17] OCR has responsibility for DOEd's external civil rights enforcement, including the enforcement of Title VI and other civil rights statutes pertaining to DOEd's federally assisted and federally conducted programs.[18] The Assistant Secretary for Civil Rights has direct authority over civil rights enforcement for all statutes applying to DOEd programs.[19] OCR is not responsible for internal equal employment opportunity matters related to Title VII of the Civil Rights Act of 1964. Thus, Title VI enforcement activities are protected from the competing resource and staffing needs of DOEd's internal civil rights workload.

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[8] Ibid., p. I. Once these programs are demonstrated to be successful, they are sponsored by State and local sources, rather than Federal funds.

[9] *See* ibid., pp. 49–65.

[10] Ibid., p. 13.

[11] Ibid., p. 9.

[12] *See* ibid., pp. 45–48.

[13] Ibid., pp. 15–33. Most student grants and loans funded by DOEd are awarded to the students by lending institutions and institutions of higher education. Lim and Lahring interview.

[14] *Guide to DOEd Programs*, pp. 34–44, 66–78.

[15] DOEd Survey, Q. 20, p. 14.

[16] *See* Office of the Federal Register, National Archives and Records Administration, *The United States Government Manual 1994/95* (Superintendent of Documents: Washington, D.C., 1994), p. 266.

[17] Jeanette Lim, Director, and Susan Bowers, Deputy Director, Policy, Enforcement, and Program Service, Office for Civil Rights, U.S. Department of Education, interview in Washington, D.C., Jan. 26, 1995, p. 1 (hereafter cited as Lim and Bowers January 1995 interview).

[18] In addition to Title VI, OCR has enforcement responsibility for: Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (1988); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988 & Supp. V 1993); the Age Discrimination Act of 1975, 42 U.S.C. §§ 6101–6107 (1988); and Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12,131–12,134 (Supp. V 1993).

[19] *See* DOEd Survey, Qs. 20, 22, pp. 14, 15.

OCR consists of 3 headquarters components and 10 regional offices.[20] OCR's headquarters offices provide legal, policy, and management support for its enforcement program. OCR's headquarters offices include:

- *Immediate Office of the Assistant Secretary*—This office serves as the Assistant Secretary's principal policy advisor, sets OCR's long-range priorities, and manages OCR's congressional liaison and public information activities. It contains an Executive Operations Staff, which is responsible for management and operations support for other OCR components, as well as for controlling the flow of documents through OCR.[21]

- *Policy, Enforcement, and Program Service*—This service oversees all aspects of OCR's policy development and dissemination and provides policy, programmatic, and legal guidance and support to all other OCR components. It consists of the litigation staff, which represents OCR in administrative litigation,[22] and the Program Operations Division, which determines the compliance status of recipients in certain programs and assists the regional offices with complaint investigations and compliance reviews as necessary.[23] In addition, the service contains the Elementary and Secondary Education Policy Division, and the Postsecondary Education Policy Division which both develop regulations, guidelines, legal standards, and policies for Title VI and other civil rights statutes pertaining to federally assisted programs.[24]

- *Planning, Analysis, and Systems Service*—This service is responsible for OCR's operational planning, development of fiscal year goals and objectives, and evaluation of OCR's efficiency and effectiveness at meeting these goals. It also maintains OCR's information systems and is responsible for OCR's civil rights surveys.[25]

Whereas most other civil rights offices do not have legal staff and must seek legal support from their agency's offices of general counsel, OCR's staff includes attorneys. They provide Title VI legal support by reviewing enforcement cases for legal sufficiency, developing guidance materials, and serving as the liaison to DOEd's Office of General Counsel and the U.S. Department of Justice on case-related matters. However, most major OCR policy decisions are also reviewed by the Office of General Counsel. In addition, the

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[20] U.S. Department of Education, "Office for Civil Rights," p. 2 (undated) (hereafter cited as "Office for Civil Rights").

[21] Ibid. pp. 2–3.

[22] Ibid., pp. 6–7.

[23] *See* ibid., p. 9. The Programs Operations Division is responsible for determining compliance in programs such as the Magnet School Assistance Program, the Vocational Education Methods of Administration Program, and Statewide higher education desegregation plans. Ibid. According to DOEd, these programs are Statewide in scope or require close coordination with the headquarters Office of Elementary and Secondary Education, the Office of Postsecondary Education, and the Office of Vocational Education. Compliance efforts for these programs benefit from the national perspective of headquarters staff. Raymond C. Pierce, Deputy Assistant Secretary, Office for Civil Rights, U.S. Department of Education, letter to Frederick D. Isler, Deputy Assistant Staff Director, Office for Civil Rights Evaluation, U.S. Commission on Civil Rights, p. 2, June 10, 1994 (hereafter cited as Pierce June 1994 letter); Lim and Bowers January 1995 interview.

[24] *See* "Office for Civil Rights," pp. 7–9.

[25] Ibid., p. 10.

Office of General Counsel reviews all OCR enforcement actions and refers to the Department of Justice all cases requiring litigation.[26]

Three-quarters of OCR's staff are in its regional offices.[27] The regional offices implement the majority of DOEd's Title VI enforcement activities. Each regional office is headed by a regional director who reports to the Deputy Assistant Secretary for Civil Rights. In addition to the Office of the Regional Director, OCR's regional offices generally consist of program review and management support staff, civil rights legal staff, and either a single or two compliance divisions: an elementary and secondary education division and a postsecondary education division.[28]

In sum, OCR's organizational structure is exemplary and epitomizes the arrangement essential for Title VI enforcement. It enables the Assistant Secretary, under the leadership of the Secretary, to develop, conduct, and control DOEd's Title VI enforcement activities. By positioning all external civil rights enforcement authority in OCR, including regional staff and legal staff, DOEd ensures that the Assistant Secretary oversees all external civil rights compliance functions. OCR's decentralized structure ensures that Title VI enforcement is conducted effectively because most of the Title VI enforcement is executed by regional offices that are supported by a strong headquarters office providing policy statements, legal guidance, coordination, and support. In addition, because OCR's external civil rights enforcement is functionally separate from all internal civil rights activities, DOEd ensures that internal civil rights priorities do not impede the external enforcement programs. Furthermore, because the Assistant Secretary for Civil Rights reports directly to the Deputy Secretary for Education, civil rights enforcement holds appropriate prominence within DOEd. Overall, OCR's organizational structure illustrates the importance placed on Title VI compliance and enforcement in the administration of DOEd's financial assistance programs. The priority of Title VI at DOEd is exemplified especially by OCR's Policy, Enforcement, and Program Service, including a legal support staff, devoted solely to external civil rights enforcement.

### Budget, Staffing, and Workload of OCR

OCR's budget is earmarked in the DOEd appropriation from Congress. However, funds for enforcing Title VI are not separately identified in the appropriation. OCR's Planning, Analysis, and Systems Service maintains information systems and conducts operational planning for OCR. Under DOEd's system, each regional component maintains a summary of its projected full-time equivalent (FTE) usage for the fiscal year.[29] The summary allows OCR to track separately its expenditures by issue area and civil rights activity, such as compliance reviews, complaint investigations, training, and focus groups and outreach.[30] OCR stated that by utilizing a strategic plan with component operational plans and priority issue designations, it prioritizes its civil rights enforcement activities for budget and resource analysis. By monitoring its staff and budgetary resources allocated to various civil rights enforcement activities, OCR ensures that Title VI enforcement activities remain a priority, and plans its civil rights enforcement activities based on resources and issue priorities.[31]

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[26] Pierce June 1994 letter, p. 7.

[27] DOEd Survey, Q. 37, p. 25.

[28] Lawrence Bussey, Branch Chief, Reports & Analysis, Planning, Analysis and Systems Service, Office for Civil Rights, U.S. Department of Education, letter to Nadja Zalokar, Social Scientist, U.S. Commission on Civil Rights, attachment, "Office for Civil Rights Regional Offices (ECD1–ECDX)," p. 1, June 21, 1994.

[29] Lim and Lahring interview. *See* Norma V. Cantú, Assistant Secretary, Office for Civil Rights, U.S. Department of Education, and Raymond C. Pierce, Deputy Assistant Secretary, Office for Civil Rights, U.S. Department of Education, memorandum to senior staff and component planning teams, re: Development of the FY 1996 Enforcement Docket, Mar. 1, 1995, p. 1 (hereafter cited as Cantú March 1995 memorandum). OCR established a format for the analysis using spreadsheet software and transports the information via an electronic mail system. Ibid.

[30] Ibid. *See also* DOEd Survey, Qs. 29, 30, 33, pp. 19, 21.

OCR has experienced variation in budget and staffing. OCR's budget declined from $46.9 million in 1981 to $40.5 million in 1988. Subsequently, OCR's budget increased substantially during the 1990s. By 1994, OCR's budget had reached $56.6 million.[32] Although nominally 20 percent higher than OCR's 1981 appropriated budget, the 1994 appropriation was 25 percent lower in real terms. OCR stated that its budget increase between 1981 and 1994 was not sufficient to keep up with salary increases, inflation, and OCR's common support expense account. OCR estimated that it would take an additional $15.7 million in personnel compensation and benefits to restore OCR to its 1981 staffing level and that more money would be required for space or rent, training, travel, and supplies.[33]

OCR's staff decreased from 1,099 in 1981 to 808 in 1988, then increased to 848 in 1992.[34] Thereafter, staffing began to diminish again, reaching 821 in 1994.[35] OCR's staff remains much smaller than its 1981 size.

By comparison to the 20 percent nominal budget increase received by OCR, the total budget for DOEd almost doubled between 1981 and 1993. OCR's budget expanded at the same rate (5 percent) as DOEd's total budget only once, between 1992 and 1993.[36] Hence, OCR's budget has fallen relative to DOEd's budget since the 1980s.[37]

To address the problem of increasing complaints and an overall decline in OCR's real budget and staffing since the 1980s, OCR has assessed its operations to develop a strategy for effectively fulfilling its Title VI enforcement responsibilities.[38] OCR has performed its responsibilities effectively by reducing staff primarily in the secretarial ranks and offsetting that reduction by utilizing automation and computer technology.[39] For example, in 1995, OCR is completing the process of providing a personal computer to every investigator, equal opportunity specialist, and attorney.[40] To increase productivity, OCR has implemented numerous pilot projects in all regional and headquarters components pursuant to government reinvention. These pilot projects include case resolution teams, priority issue

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[31] Lim and Lahring interview.

[32] OCR 1994 Budget and Staffing Information, submitted to the U.S. Commission on Civil Rights by Jeanette Lim, Director, Policy, Enforcement, and Program Service, Office for Civil Rights, U.S. Department of Education (hereafter cited as OCR 1994 Budget and Staffing Information). *See also* table 5.1. Data for years before 1981 were not available.

[33] OCR 1994 Budget and Staffing Information.

[34] DOEd Survey, Q. 35, p. 23. *See also* table 5.1.

[35] OCR 1994 Budget and Staffing Information. *See also* table 5.1. Data for years before 1981 were not available.

[36] DOEd Survey, Q. 33, p. 21. Data for years before 1981 were not available.

[37] Although 98 percent of DOEd's budget provides program grants to States, local governments, and agencies and financial aid to students, the remaining 2 percent of DOEd's budget supports administrative offices, such as OCR and DOEd's Program Administration office. OCR's budget has not increased at the same rate as the other administrative offices at DOEd. Between 1981 and 1994, OCR's budget increased by 20 percent while the Program Administration budget increased by 53 percent. *See* Jeanette Lim, Director, Policy, Enforcement, and Program Service, Office for Civil Rights, U.S. Department of Education, note to Frederick D. Isler, Acting Assistant Staff Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, May 12, 1995, tab A (hereafter cited as Lim May 1995 letter). According to OCR, the increase is directly related to the increase in DOEd's overall program responsibilities, especially in the area of student aid which requires DOEd to fund costly student aid delivery contracts in its administrative accounts, such as DOEd's initiative to end defaults on student loans. *See* ibid.

[38] OCR 1994 Budget and Staffing Information.

[39] Lim and Lahring interview.

[40] Ibid.

**TABLE 5.1**
**U.S. Department of Education's Civil Rights Budget and Staffing: 1981–1994***

| | 1981 | 1984 | 1988 | 1992 | 1993 | 1994 |
|---|---|---|---|---|---|---|
| *Budget* | | | | | | |
| Thousands of $$ | $46,915 | $44,396 | $40,530 | $53,625 | $56,402 | $56,570 |
| Thousands of constant $$ | $59,612 | $48,573 | $39,122 | $44,650 | $45,670 | $44,438 |
| *Civil rights staff* | 1,099 | 907 | 808 | 848 | 862 | 821 |

*DOEd does not maintain information for the years before 1981.
Source: U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Education, Q. 33, p. 21; Q. 35(c), p. 23; OCR FY 1994 Budget Information, submitted to the U.S. Commission on Civil Rights by Jeanette Lim, Director, Policy, Enforcement, and Program Service, Office for Civil Rights, U.S. Department of Education. To calculate the constant-dollar figures, the nominal dollar amounts were adjusted using a price index for government services developed by the U.S. Department of Commerce, Bureau of Economic Analysis, as reported in President of the United States, *Economic Report of the President* (Superintendent of Documents: Washington, DC, 1995), table B-3, p. 279. The base year for the price index is 1987.

teams, and technical/information teams. The case resolution teams, for example, are designed to eliminate bureaucratic procedures and practices, particularly multiple layers of review.[41]

However, despite these efforts to increase OCR's productivity, OCR's effectiveness may be impaired by anticipated budget and staffing reductions as a result of agencywide downsizing under the National Performance Review.[42] OCR's projected staff ceiling for fiscal year 1999 is 780, 41 fewer FTEs than it had in fiscal year 1994. OCR plans to reach its staff ceiling by cutting staffing in OCR headquarters by approximately 34 FTEs and keeping regional staffing levels constant.[43] The Assistant Secretary for Civil Rights indicated that these staffing reductions would require "consolidation of functions now spread out among headquarters services," but also reinforced that OCR "must ensure that core headquarters functions continue to be carried out with excellence."[44]

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[41] Office for Civil Rights, U.S. Department of Education, *Annual Report to Congress, Fiscal Year 1994*, p. 12 (hereafter cited as OCR FY 1994 *Annual Report*).

[42] OCR supports the downsizing efforts of the National Performance Review and believes that its productivity and efficiency efforts will improve OCR's civil rights activities.

[43] OCR 1994 Budget and Staffing Information.

[44] Norma V. Cantú, Assistant Secretary, Office for Civil Rights, U.S. Department of Education, memorandum for all OCR staff, re: "Guidelines for Staff Deployment Through 1999," June 13, 1994.

## Regulations, Guidelines, Policies, and Procedures

### Regulations

DOEd's current Title VI regulations[45] are those originally written for the U.S. Department of Health, Education, and Welfare (HEW). The Department of Justice relies on DOEd's Title VI regulations as a model for all other agencies.[46]

Title VI regulations provide each agency with the opportunity to define the standards for recipient compliance with Title VI and to describe their Title VI enforcement policies and procedures. The U.S. Supreme Court has relied on agency Title VI regulations to interpret the broad statutory language of Title VI.[47] Thus, for example, for an agency to prove successfully disparate impact discrimination under Title VI, it must include and define that standard in its implementing regulations.

DOEd's regulations are specific to Title VI. They satisfy most of the basic requirements delineated in the Department of Justice's coordination regulations[48] and the Commission's *Compliance Officer's Manual*.[49] They prohibit all the forms of discrimination listed in the Commission's *Compliance Officer's Manual*.[50]

DOEd's regulations also contain effective language that continues to serve as a model for other agencies with Title VI responsibility. For example, DOEd's regulations contain strong enforcement language. With respect to employment discrimination, DOEd's regulations prohibit employment discrimination where the primary objective of the assistance is to provide employment.[51] They also prohibit discriminatory employment practices in the administration of a federally funded program or activity that result in discrimination against that program's or activity's intended beneficiaries.[52] In addition, pursuant to Department of Justice procedures, DOEd and the Equal Employment Opportunity Commission have procedures in place for referral of Title VI employment discrimination cases.[53]

DOEd's regulations include a more extensive list of prohibited discriminatory practices than the list in the Commission's *Compliance Officer's Manual*. For example, they proscribe denying an individual, on the basis of race, color, or national origin, the opportunity "to participate as a member of a planning or advisory body which is an integral part of the program."[54] The regulations also provide specific education-related examples that serve to clarify their practical application to DOEd's federally funded programs.[55]

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[45] 34 C.F.R. Part 100 (1994).

[46] U.S. Commission on Civil Rights, *Survey of the Department of Justice Oversight and Coordination Responsibility for Consistent and Effective Implementation of Title VI of the Civil Rights Act of 1964*, response completed by the U.S. Department of Justice, Q. 14, p. 6.

[47] *See* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 591–92 (1983); Lau v. Nichols, 414 U.S. 563, 566–69 (1973). In *Guardians*, the Supreme Court held that, while it is unclear whether Title VI standing alone prohibits unintentional discrimination, Title VI implementing regulations that explicitly forbid discrimination based on disparate impact are permissible, because they are not inconsistent with the purposes of Title VI. 463 U.S. at 591.

[48] 28 C.F.R. §§ 42.401–42.415 (1994).

[49] U.S. Commission on Civil Rights, *Compliance Officer's Manual: A Handbook of Compliance Procedures under Title VI of the Civil Rights Act of 1964* (1966) (hereafter cited as Commission's *Compliance Officer's Manual*).

[50] *See* discussion in chapter 4, pp. 162–63.

[51] 34 C.F.R. § 100.3(c)(1) (1994).

[52] *Id.* § 100.3(c)(3). *See* discussion in chapter 2, p. 34.

[53] As of March 4, 1985, DOEd's participation in the referral of employment discrimination complaints to the Equal Employment Opportunity Commission was limited as a result of a court order in *Adams v. Bell*, C.A. No. 3095–70 and *Women's Equity Action League v. Bell*, C.A. No. 74–1720 (D.D.C. 1985) (order on defendant's motion for interim relief). However, since the restrictions were rescinded by a 1990 court order, OCR is participating fully by order of law in the referral of employment complaints. *See Women's Equity Action v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990). *See also* 28 C.F.R.§§ 42.601–42.613 (1994). As of April 1995, DOEd is awaiting official publication of a notice rescinding the restrictions.

DOEd's Title VI regulations were last updated in 1980, when DOEd was created.[56] Therefore, they do not reflect recent Title VI developments, such as the restoration of broad Title VI coverage under the Civil Rights Restoration Act of 1987.[57] DOEd's regulations do not contain the act's precise definition of "programs or activities" that is essential for establishing coverage and jurisdiction under Title VI. Although it is true that the act simply restored Title VI coverage to its scope prior to the decision in *Grove City College v. Bell*,[58] the regulations do not clarify and codify the important language created by the act.

In addition, although the Civil Rights Restoration Act did not alter the enforcement language gage of Title VI that existed prior to *Grove City*, the act's legislative history notes that Federal funds designated for a specific purpose may be terminated under two conditions, in the event that voluntary compliance efforts fail.[59] An agency may terminate funds not only if discrimination is "pinpointed" to the particular program receiving funds, but also if the use of the Federal funds is "infected" by discrimination elsewhere in the operation of the recipient.[60]

OCR officials stated that, in practice, DOEd brings termination actions under both the "pinpointing" theory and the "infection" theory developed in *Board of Public Instruction v. Finch*.[61] Although DOEd originated the "infection" theory and applied it well before *Grove City* and the Civil Rights Restoration Act, DOEd's regulations do not reflect the full scope of DOEd's fund suspension and termination authority.[62] DOEd officials maintain that DOEd's Title VI regulations do not need to be changed, because the Civil Rights Restoration Act merely restored procedures that existed prior to the decision in *Grove City*.[63]

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[54] 34 C.F.R. § 100.3(b)(vii) (1994).

[55] *See id.* § 100.5.

[56] DOEd Survey, Q. 9, p. 7.

[57] Pub. L. No. 100–259, 102 Stat. 28 (codified as amended at 20 U.S.C. §§ 1681note, 1687, 1687note, 1688, 1688note (1988); 29 U.S.C. §§ 706, 794 (1988 & Supp. V 1993); 42 U.S.C. §§ 2000d–4a, 6107 (1988)). *See* discussion in chapter 2, pp. 36–40.

[58] 465 U.S. 555 (1984). The Supreme Court's decision in *Grove City* addressed the broader issue of the coverage and applicability of Title IX's prohibition on sex discrimination in programs receiving Federal financial assistance. The Court stated that Title IX coverage was triggered because some students at the college received Federal student education grants which are used, in effect, to subsidize the college's own financial aid program. Thus, the Court held that Title IX's coverage was not institution-wide, but instead applied only to the specific program receiving Federal financial assistance. 465 U.S. at 573–74. Congress statutorily reversed this conclusion in the Civil Rights Restoration Act of 1987, and clarified the coverage of Title VI, Title IX, Section 504 of the Rehabilitation Act, and the Age Discrimination Act. U.S. Congress, Senate, Committee on Labor and Human Resources, *Civil Rights Restoration Act of 1987*, 100th Cong., 2d sess., S. Rep. No. 64, p. 2, *reprinted in* 1988 U.S.C.C.A.N. 3, 3–4 (hereafter cited as CRRA Senate Committee Report).

[59] *See* CRRA Senate Committee Report, p. 20, 1988 U.S.C.C.A.N. 3, 22.

[60] Ibid. Prior to *Grove City*, fund termination was addressed by the fifth circuit in *Board of Pub. Instruction v. Finch*. *See* 414 F.2d 1068, 1078 (5th Cir. 1969). The fifth circuit held that funds earmarked for a particular purpose would not be terminated unless discrimination was found in the use of those funds or the use of the funds was infected with discrimination elsewhere in the operation of the recipient. *See* 414 F.2d at 1078–79. For a further discussion of the "pinpoint" and "infection" theories, see chapter 2, pp. 38–39.

[61] Jeanette Lim, Director, and Susan Bowers, Deputy Director, Policy, Enforcement, and Program Service, Office for Civil Rights, U.S. Department of Education, interview in Washington, D.C., Sept. 12, 1994, p. 2 (hereafter cited as Lim and Bowers September 1994 interview).

[62] 34 C.F.R. § 100.8(c) (1994) (emphasis added).

[63] Lim and Lahring interview.

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Nevertheless, because the *Grove City* decision cast doubt over agencies' authority to use the infection theory, and the regulations do not specifically recognize this authority, revising the regulations would remove any lingering confusion on the issues of Title VI coverage and fund suspension and termination.

Although DOEd's Title VI regulations contain an "Appendix A" that lists all DOEd programs covered by the regulations,[64] including State-administered continuing programs and all other DOEd federally assisted programs, that list has not been updated since DOEd was created in 1980. DOEd indicated that it does not have a schedule for updating Appendix A regularly[65] and that it is aware that the appendix is not a current listing of DOEd's financial assistance programs.[66] OCR officials also maintained that updating DOEd's Appendix A would require a considerable amount of effort and resources.[67] As a result of OCR's failure to update its appendix, as required by the Department of Justice, its list of federally funded programs covered by DOEd's regulations excludes all programs established since 1980 and does not include any revisions to the original list, such as abolished programs. However, OCR officials are considering, as an alternative to updating the appendix, revising the appendix to reference that the annual departmental publication listing DOEd's federally funded programs is available to the public by contacting DOEd's Public Affairs Office.[68]

### Guidelines

DOEd has not, as required by the Department of Justice,[69] published Title VI guidelines for each of its federally assisted programs. The only programs for which such guidelines have been published are DOEd's vocational education programs.[70] The vocational education guidelines are exemplary Title VI guidelines because they are thorough, detailed, and include numerous examples of their application.

Although DOEd has not published formal guidelines for its other financially assisted programs, OCR gives guidance for its other programs in a number of other forms, including policy guidance, *Federal Register* notices, "dear colleague" letters, and joint guidance with other components of DOEd. OCR reported that it is implementing plans to issue *Federal Register* guidance on OCR's approach to important civil rights issues.[71]

DOEd's varied approach to issuing guidance may be preferable to the Department of Justice's strict requirement that agencies publish Title VI guidelines for each federally assisted program. However, unless such guidance exists and is easily obtainable for each program, DOEd staff and recipients and participants in DOEd programs may lack critical information concerning the Title VI compliance requirements of those programs.

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[64] For a further discussion on the relevance of Appendix A, *see* chapter 4.

[65] Pierce June 1994 letter, p. 1.

[66] Lim and Bowers January 1995 interview, p. 2. DOEd officials stated that requiring recipients of Federal financial assistance to sign an assurance of compliance with Federal civil rights laws serves, in part, the purpose of updating the Appendix A list of federally funded programs. Lim and Lahring interview. While this substitution may keep applicants and recipients informed about DOEd's financial assistance programs, this process does not ensure that participants, beneficiaries, or the general public receive the necessary information on programs covered by Title VI.

[67] Lim and Lahring interview.

[68] Lim and Bowers September 1994 interview, p. 6.

[69] 28 C.F.R. § 42.404(a) (1994).

[70] U.S. Department of Health, Education, and Welfare, Office for Civil Rights, Office of the Secretary, "Vocational Education Programs Guidelines for Eliminating Discrimination and Denial of Services on the Basis of Race, Color, National Origin, Sex and Handicap," 44 Fed. Reg. 56 (1979) (codified as amended at 34 C.F.R. Part 100, App. B (1994)).

[71] Pierce June 1994 letter, pp. 6–7.

### Policies

In recent years, OCR has been active in publishing policy memoranda and statements clarifying Title VI's application to its programs. Such policies and policy statements, in conjunction with DOEd's regulations and guidelines, have created a strong foundation for OCR's Title VI compliance program.

Several of these memoranda addressed Title VI requirements for students with limited English proficiency. For example, in 1990, DOEd reissued a May 1970 memorandum on the identification of discrimination and denial of services on the basis of national origin and a 1985 policy document outlining OCR's compliance procedures for language minority students.[72] Subsequently, in 1991, OCR issued a policy update on the same topic, entitled "Policy Update on Schools' Obligations Toward National Origin Minority Students with Limited-English Proficiency (LEP students)."[73] The policy update was designed to guide OCR's "*Lau*" compliance reviews, compliance reviews of school districts evaluating their fulfillment of obligations under Title VI as interpreted in *Lau v. Nichols*.[74] The policy update addresses several issues, including staffing requirements for programs aimed at assisting LEP students, criteria for transferring LEP students from language programs to regular educational programs, the necessity for formal LEP identification and assessment procedures, and issues related to the segregation of LEP students and other students. The policy update clarifies that students should not be placed in special education programs based on criteria related only to their limited English proficiency and that LEP students should not be excluded from "gifted and talented" programs.[75] OCR officials indicated that DOEd has created a *Lau* team to assist in cases that raise second-generation *Lau* issues, such as identification of LEP students, testing of LEP students, and opportunities for LEP students in gifted and talented programs.[76]

In January 1994, DOEd published an announcement in the *Federal Register*[77] concerning the effects of the Supreme Court's decision in *United States v. Fordice*.[78] In *Fordice*, the Supreme Court held that States that operated *de jure* segregated higher education systems have an affirmative duty to remove the effects of prior segregated systems.[79] The Court held further that the adoption of race-neutral policies alone does not demonstrate that the State has remedied its prior segregated system.[80] DOEd's announcement explained the impact of the *Fordice* decision on DOEd's enforcement of Title VI with respect to

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[72] William L. Smith, Acting Assistant Secretary, Office for Civil Rights, U.S. Department of Education, memorandum to OCR Senior Staff, "Office for Civil Rights Policy Regarding the Treatment of National Origin Minority Students Who are Limited-English Proficient," Apr. 6, 1990 (reissuing OCR's Title VI Language Minority Compliance Procedures dated Dec. 3, 1985).

[73] Michael L. Williams, Assistant Secretary, Office for Civil Rights, U.S. Department of Education, memorandum to OCR Senior Staff, "Policy Update on Schools' Obligations Toward National Origin Minority Students with Limited-English Proficiency (LEP students)," Sept. 27, 1991 (hereafter cited as "*Lau* Policy Update").

[74] 414 U.S. 563 (1974). In *Lau*, the Supreme Court held that the San Francisco school system's failure to provide English language instruction or other adequate instructional procedures to students who do not speak English constitutes discrimination based on national origin. 414 at 568–69. Thus, DOEd now requires school systems receiving financial assistance to provide programs for students with limited English proficiency.

[75] "*Lau* Policy Update."

[76] Lim and Bowers September 1994 interview, p. 2.

[77] 59 Fed. Reg. 4271 (1994).

[78] 112 S. Ct. 2727 (1992).

[79] *Id.* at 2735.

[80] *Id.* at 2736.

State systems of higher education that had previously operated under a system of *de jure* discrimination. The announcement indicates that the *Fordice* decision is consistent with DOEd's previous policy, outlined in a 1978 *Federal Register* notice entitled "Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education."[81]

In February 1994, after a number of years of consideration, DOEd issued final policy guidance on Title VI's nondiscrimination requirements with respect to student financial aid that is awarded on the basis of race or national origin.[82] The guidance represents DOEd's current policy on the use of race-targeted student financial assistance under Title VI.[83] DOEd issued this guidance "to assist colleges in fashioning legally defensible affirmative action programs to promote the access of minority students to postsecondary education."[84]

Finally, in March 1994, OCR issued guidance on the procedures and analysis that OCR will use in investigating issues related to racial harassment against students at educational institutions.[85] The guidance specifies that certain racially based conduct violates Title VI. Such conduct consists of disparate treatment of students on the basis of race by recipients' agents, as well as the existence of a racially hostile environment that is encouraged, accepted, tolerated, or left uncorrected by a recipient.[86] In investigating allegations of disparate treatment, OCR will determine:

> 1) Whether an official or representative of a recipient treated someone differently in a way that interfered with or limited the ability of a student to participate in or benefit from a program or activity of the recipient;
> 2) Whether the different treatment occurred in the course of authorized or assigned duties or responsibilities of the agent or employee;
> 3) Whether the different treatment was based on race, color, or national origin; and,
> 4) Whether there was a legitimate nondiscriminatory basis for the different treatment.[87]

In investigating the existence of a racially hostile environment, OCR will determine:

> 1) Whether a racially hostile environment exists, which requires that the racial harassment be severe, pervasive, or persistent;
> 2) Whether the recipient had actual or constructive notice of the racially hostile environment; and,
> 3) Whether the recipient failed to respond adequately to redress the racially hostile environment.[88]

The guidance indicates that it is not intended to regulate the "content of speech."[89] According to the Director of OCR's Policy, Program, and Enforcement Service:

> As part of the Federal government, OCR must comply with the First Amendment in investigating and analyzing cases and in developing remedies.
>
> At every stage of its investigative and enforcement processes, OCR recognizes and respects academic freedom and the free speech rights of individuals protected by the First Amendment. These principles are essential

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[81] 43 Fed. Reg. 6,658 (1978).

[82] 59 Fed. Reg. 8,756 (1994).

[83] 59 Fed. Reg. 8,756 (1994).

[84] *Id.* at 8,756.

[85] Notice of Investigative Guidance on Racial Incidents and Harassment Against Students at Educational Institutions, 59 Fed. Reg. 11,448 (1994).

[86] *Id.*

[87] *Id.* at 11,448–49.

[88] *Id.* at 11,449.

[89] *Id.* at 11,448.

> to a healthy educational environment and underpin the very educational programs the discrimination statutes are meant to protect. . . . OCR is keenly aware of the complexity and importance of these legal issues in the educational context. Accordingly, OCR regional offices consult with Headquarters as soon as First Amendment considerations arise in cases and analyze them on a case-by-case basis.[90]

As an additional compliance effort, OCR codifies all of its letters of finding that constitute new policy in a computerized "Policy Codification System." Information about precedent-setting cases is also exchanged through conference calls among senior staff, chief regional attorneys, and headquarters policy staff.[91]

OCR's policy statements are extremely valuable because they assist in educating DOEd compliance staff, DOEd recipients, program participants, and the general public about DOEd's interpretation of the practical application of Title VI to its federally sponsored programs and activities. This, in turns, helps to ensure that DOEd's programs are operated in compliance with Title VI.

Although OCR has issued the foregoing policy statements, it has yet to issue a policy memorandum addressing the substantive effects of the Civil Rights Restoration Act on Title VI enforcement.[92] DOEd has indicated that OCR has not issued policy statements on the act "because the language in the statute provided sufficiently clear guidance."[93]

### Procedures

In addition to DOEd's Title VI regulations establishing the basic methods for conducting investigations, effecting compliance, conducting hearings, and issuing decisions, OCR has recently issued a *Complaint Resolution Manual*, which has superseded its previous *Investigation Procedures Manual*.[94] The new manual focuses on encouraging parties to resolve their disputes before OCR initiates a complaint investigation. The manual provides expedited approaches to case resolutions, such as facilitation by OCR of a resolution satisfactory to both the complainant and the recipient without necessitating an investigation or formal determination, conferences and other methods of expedited factfinding, and providing the recipient the opportunity to resolve fully all allegations of noncompliance.[95] However, with the exception of this manual, OCR has not published manuals explaining to investigators the procedures for executing other enforcement activities, such as preaward reviews.

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[90] Lim and Bowers January 1995 interview, documents submitted, "First Amendment Issues in the Context of Racial and Sexual Harassment" (one page).

[91] Pierce June 1994 letter, p. 4.

[92] OCR issued interim procedures and a policy memorandum explaining OCR's jurisdiction under the Civil Rights Restoration Act. The act does not apply retroactively to complaints filed before its March 22, 1988, effective date. Therefore, the memorandum provides examples for determining whether a complaint closed or narrowed because of *Grove City* alleges a continuing violation that persisted after the effective date of the act. *See* Terence J. Pell, Deputy Assistant Secretary for Policy, U.S. Department of Education, memorandum to Regional Civil Rights Directors, re: "The Impact of the Civil Rights Restoration Act on Jurisdiction," June 21, 1988; LeGree S. Daniels, Assistant Secretary for Civil Rights, U.S. Department of Education, memorandum to OCR senior staff, re: "Interim Procedures to Implement the Civil Rights Restoration Act (*Grove City* legislation)," Mar. 23, 1988. OCR has not issued any policies discussing the issues of Title VI coverage or the fund termination remedy.

[93] Raymond C. Pierce, Deputy Assistant Secretary, Office for Civil Rights, U.S. Department of Education, letter to Frederick D. Isler, Deputy Assistant Staff Director, Office for Civil Rights Evaluation, U.S. Commission on Civil Rights, May 9, 1994, attachment, "Office for Civil Rights Responses to Questions," p. 2 (hereafter cited as Pierce May 1994 letter).

[94] OCR, *OCR Complaint Resolution Manual*, Nov. 30, 1993. According to OCR officials the manual was issued in December 1993. Lim and Bowers January 1995 interview, p. 2.

[95] U.S. Department of Justice, Civil Rights Division, Coordination and Review Section, "Education Revamps Investigation Procedures," *Civil Rights Forum*, vol. 9, no. 1(Spring 1995), p. 5.

**TABLE 5.2**
**U.S. Department of Education's Title VI Enforcement Activity: Preaward Reviews, Postaward Reviews, Complaints**

| | 1981 | 1984 | 1988 | 1992 | 1993 |
|---|---|---|---|---|---|
| Preaward reviews | N/A | N/A | N/A | 65 | 151 |
| Postaward reviews | | | | | |
| Desk-audit | 0 | 1 | 139 | 0 | 165 |
| Onsite | N/A | 97 | 104 | 15 | 44 |
| Complaints | | | | | |
| All civil rights | 2,887 | 1,934 | 3,532 | 4,434 | 5,090 |
| Title VI | 831 | 616 | 787 | 1,066 | 1,292 |

*DOEd does not maintain information for the years before 1981.

Source: U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Education, Q. 41(e), p. 28; Q. 45(a), p. 33; Q. 68(c), p. 44; Q. 71, p. 45.

## Process of Title VI Enforcement

DOEd's Title VI enforcement program is primarily complaint driven. The number of complaints OCR receives annually has increased during recent years, compelling OCR to devote more than one-half of its staff time to conducting complaint investigations. In comparison to the large amount of staff time devoted to complaint investigations, OCR has not committed sufficient resources to other critical methods of enforcement, especially preaward and postaward reviews.

### Preaward Reviews

OCR's preaward review program is very limited.[96] OCR only conducts preaward reviews for one federally assisted program, the Magnet Schools Assistance Program, which is a relatively small program. The statute and regulations for the Magnet Schools Assistance Program require OCR to review applications to determine plan eligibility and evaluate the compliance status of applicants.[97] In 1993, OCR conducted 151 preaward reviews of Magnet Schools Assistance Program applicants.[98]

During the Magnet Schools Assistance Program preaward reviews, staff evaluate information provided to them by the school districts and from other sources, such as OCR's regions, the Department of Justice, and third parties in court-ordered desegregation suits.[99] The reviews are conducted by 8 to 10 staff members over a period of 3 months each year. The reviews are desk-audit reviews, but the staff make telephone calls to the applicants to collect any additional information needed. During these phone calls, staff provide technical assistance and occasionally negotiate voluntary compliance.[100]

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[96] *See* chapter 4 for a discussion of preaward reviews, pp. 171–72.

[97] 34 C.F.R. Part 280 (1994).

[98] DOEd Survey, Q. 40, p. 27. *See also* table 5.2.

[99] Pierce June 1994 letter, p. 4.

[100] Lim and Bowers January 1995 interview, p. 2.

Aside from the Magnet Schools Assistance Program preaward reviews, DOEd does not conduct preaward reviews for any of its major programs, such as Title I, which has a large impact on the educational opportunity of racial and ethnic minorities. As a consequence of OCR's failure to execute a comprehensive preaward review system, DOEd has disbursed billions of dollars of assistance without first meaningfully determining whether its programs discriminate on the basis of race, color, or national origin and whether its funds are equitably distributed across population groups.

However, in 1994, an amendment to the General Education Provisions Act[101] directed DOEd to require each applicant for financial assistance to submit a description of the steps the applicant will take "to ensure equitable access to, and equitable participation in, the project or activity to be conducted with such assistance, by addressing the special needs of students, teachers, and other program beneficiaries in order to overcome barriers to equitable participation, including barriers based on gender, race, color, national origin, disability, and age."[102] As such, DOEd's program offices must review these descriptions as a prerequisite to awarding funds. In 1995, DOEd is developing procedures to implement this requirement and train program office staff to conduct these reviews.[103]

### Postaward Desk-Audit Reviews

OCR regularly reviews data from its Elementary and Secondary Civil Rights Survey as part of its compliance activities. The level of OCR's postaward desk-audit review activities has varied over the years. OCR conducted only 1 postaward desk-audit in 1984, 139 in 1988, no desk-audit reviews in 1992, and 165 reviews in 1993.[104] Postaward desk-audit reviews allow OCR to review recipients' program practices in less time and with fewer resources than necessitated by onsite reviews. In addition, postaward desk-audit reviews provide DOEd with an opportunity to deter discrimination by targeting recipients in need of technical assistance, onsite investigation, or general modification in policies and procedures. Frequent and consistent desk-audit reviews also serve as an incentive for recipients to address deficiencies in their compliance program voluntarily in anticipation of an agency's audit. As such, DOEd's failure to conduct such reviews consistently over the years impairs its ability to discover recipients that are not in compliance with Title VI.

### Onsite Compliance Reviews

Although OCR regards compliance reviews as an important part of its enforcement program,[105] it has devoted very few resources to such reviews. For example, in fiscal year 1992, OCR spent 27 work years on onsite compliance reviews for federally assisted programs, or only 3 percent of its total work years (848) on civil rights enforcement for federally assisted programs. It initiated 77 and completed 50 onsite compliance reviews that year.[106] For fiscal year 1996, OCR plans to target 40 percent of its resources to proactive enforcement activities, including new and continuing compliance reviews, monitoring proactive compliance activities, proactive policy development, and proactive compliance litigation and enforcement.[107]

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[101] Pub. L. No. 103–382, § 427(b), 108 Stat. 3518 (to be codified at 20 U.S.C. § 1226b).

[102] *Id.*

[103] Lim and Lahring interview; Lim and Bowers January 1995 interview, p. 4.

[104] DOEd FY 1994 Implementation Plan, Workload and Performance Data. *See* table 5.2. Data for years before 1984 were not available. Although OCR has reported in its annual Civil Rights Implementation Plans that it conducts postaward desk-audits as described by DOJ's official definition, OCR stated that it does not conduct postaward desk-audits. Lim and Lahring interview. OCR reviews data from their surveys and other relevant information to determine whether compliance problems are indicated. If the information reveals no deficiencies, the recipient is not targeted for enforcement. If the data indicate problems, the recipient is targeted for a compliance review or for proactive technical assistance. *See* Lim May 1995 letter, tab E. According to OCR, what the Commission and DOJ defines as a postaward desk-audit can occur as a result of a complaint investigation or compliance review. If after receiving information from a data request, OCR determines an onsite investigation is not necessary then OCR resolves the civil rights issue by analyzing the information and data on hand. Ibid.

[105] U.S. Department of Education, "Fiscal Year 1990 Civil Rights Implementation Plan," p. 6 (hereafter cited as DOEd FY 1990 Implementation Plan).

OCR has conducted increasingly fewer compliance reviews. Between 1989 and 1993, the highest number of compliance review starts (138) was achieved in 1989.[108] The number of compliance reviews started by OCR decreased dramatically the following year, to 32, and then began to increase gradually, reaching 101 in 1993.[109] OCR attributes the lower number of such reviews to insufficient resources.[110] OCR's Management Report explained that, in recent years, "fewer staff resources were available to conduct compliance reviews because of the continuing increase in complaint receipts."[111]

During the past 2 years, however, the number of compliance reviews OCR has conducted increased substantially. In fiscal year 1993, OCR substantially increased the number of work years spent on compliance reviews. That year OCR devoted 53 work years to compliance reviews, or roughly 6 percent of its total work years (862), on civil rights enforcement for federally assisted programs. It initiated and completed 165 reviews, compared to 108 the previous year.[112] According to OCR, it initiated 51 percent more reviews in fiscal year 1994 than in fiscal year 1993.[113] The number of compliance reviews completed each year is projected to continue increasing as OCR enhances its efficiency in other enforcement areas.

Approximately one-half of the compliance reviews executed by OCR are Title VI reviews.[114] Although DOEd has received an increasing number of complaints requiring OCR attention, in 1993 OCR was able to increase, for the first time in several years, the number of Title VI compliance reviews initiated. However, the increased number of compliance reviews remained insufficient. The 44 Title VI compliance reviews OCR completed in 1993, compared to the 15 it completed in 1992, represented less than one-half of a percent of DOEd's 25,000 recipients.[115] Furthermore, the number of Title VI compliance reviews OCR completed in 1993 remained lower than in the 1980s. For instance, in 1984 OCR completed 97 compliance reviews, and in 1988 it completed 104 compliance reviews.[116]

In recognition of an increasing civil rights complaints workload and limited resources for compliance reviews, OCR developed its National Enforcement Strategy (NES) several years ago to maximize the benefits of the small amount of resources devoted to compliance reviews.[117] The NES sought to "integrat[e] OCR's compliance review program into a comprehensive and well-coordinated program of policy development, staff training, compliance reviews, technical assistance, and policy dissemination."[118] Under the NES, OCR selected recipients for compliance review based on the national priority issues established each year by the Assistant Secretary for Civil Rights.[119] By developing the NES, OCR effectively conceded that it was not directly reviewing many recipients. OCR used the NES to target some recipients for compliance reviews to serve as examples to the other recipients.

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[106] DOEd FY 1993 Implementation Plan, Workload and Performance Data, pp. 84–85.

[107] *See* Cantú March 1995 memorandum, p. 3.

[108] U.S. Department of Education, Office for Civil Rights, *Fiscal Year 1993 Year-End Management Report*, March 1994, p. 53 (hereafter cited as OCR Management Report).

[109] Ibid.

[110] Lim and Bowers September 1994 interview, p. 4.

[111] OCR Management Report, p. 53.

[112] DOEd FY 1994 Implementation Plan, Workload and Performance Data, p. 35.

[113] OCR FY 1994 *Annual Report*, p. 6.

[114] *See* ibid., p. 55.

[115] DOEd Survey, Q. 68, p. 44. *See also* table 5.2. DOEd officials maintain that these figures alone do not represent adequately OCR's compliance program. According to DOEd, these figures do not account for the multiple targeted issues and the numbers of beneficiaries affected by each compliance review. Lim and Lahring interview.

[116] DOEd Survey, Q. 68, p. 44. *See also* table 5.2. Data for years before the 1980s were not available.

The emphasis on compliance reviews has increased under OCR's new Strategic Plan, the successor to the NES issued in July 1994.[120] One of the key objectives of the Strategic Plan is to "move [OCR] from a reactive system almost exclusively responding to complaints to a balanced enforcement approach that proactively targets its resources for maximum impact," of which compliance reviews are a central component.[121] The Strategic Plan is an integrated enforcement approach, concentrating on several priority issues and aimed at informing recipients not being evaluated by OCR about their responsibilities pursuant to Title VI and the other civil rights statutes. The goal is to ensure their compliance. Under OCR's enforcement planning strategy, the regional components are given broad latitude to target their proactive enforcement program within the "umbrella priority" of "developing and ensuring the implementation of strong remedies for students denied access to high quality, high standards curriculum."[122]

In fiscal year 1994, OCR compiled a report summarizing the compliance reviews it conducted in fiscal years 1993 and 1994.[123] The report embodies valuable information concerning both the types of violations OCR discovers and the types of remedies it negotiates. However, the report does not contain a summary analysis of OCR's compliance review findings. The report indicates that OCR conducted 4 reviews to determine whether schools had nondiscriminatory student assignment policies and 28 reviews to determine whether limited-English-proficient (LEP) students had equal educational opportunities.[124] OCR's student assignment reviews discovered that the districts at issue were violating Title VI in several ways, including by grouping students according to ability, resulting in racially identifiable classes without adequate educational justification; by making student class assignments based upon achieving minimum numbers of nonminority students; and by not affording minority students adequate opportunity to participate in gifted and talented programs.[125] This type of information assists recipients and beneficiaries in understanding the practical application of Title VI's compliance requirements. It can also assist the Department of Justice in reviewing OCR's Title VI implementation and enforcement effort.

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[117] U.S. Department of Education, Office of the Assistant Secretary for Civil Rights, "National Enforcement Strategy, Office for Civil Rights, FYs 1991–1992," Dec. 11, 1990.

[118] Ibid., p. 2. In addition to guiding compliance reviews, the NES raises the priority of monitoring corrective-action plans and required a restructuring of OCR. Ibid.

[119] *See* ibid., pp. 2–3.

[120] Office for Civil Rights, U.S. Department of Education, *Strategic Plan*, draft report, July 22, 1994 (hereafter cited as *Strategic Plan*).

[121] Ibid., first goal, objective A, p. 1.

[122] Cantú March 1995 memorandum, p. 2.

[123] Office for Civil Rights, U.S. Department of Education, *Making A Difference in the Lives of Students: Compliance Review Accomplishments* (no date).

[124] Ibid., p. 4.

[125] Ibid., pp. 13–21.

OCR's LEP reviews uncovered numerous violations of Title VI. In 19 of the LEP reviews, OCR found that school districts did not have adequate procedures for identifying and assessing LEP students; in 3 of the reviews, OCR found that the school district did not have a program for LEP students.[126] In school districts that did have such programs, OCR found, in 15 cases, that not all students were afforded the opportunity to participate in the programs or that the program was not adequately staffed. Finally, 20 of the school districts reviewed did not have adequate procedures for students exiting LEP programs, did not provide information to the parents of LEP students in their language, excluded LEP students from gifted and talented programs, or wrongfully placed them in special education programs.[127] OCR reported that as a result of the compliance reviews, the school districts submitted comprehensive plans for educating LEP students and remedied specific deficiencies found in the OCR reviews.[128]

Despite OCR's emphasis on compliance reviews, the actual number of compliance reviews it performs is barely increasing.[129] Rather than focusing on increasing the number of reviews, *per se*, OCR is focussing on conducting reviews that affect large numbers of beneficiaries.[130] In addition, OCR uses its compliance reviews as a technical assistance and education and outreach tool. However, most DOEd recipients can expect never to be reviewed. Furthermore, OCR's strategy of targeting compliance reviews on specific priority issues, rather than conducting comprehensive reviews of recipients, may cause OCR to deemphasize compliance reviews designed to target programs or regions that exhibit other compliance problems. As such, although targeted reviews help to streamline OCR's enforcement efforts, they may inadvertently neglect critical instances of discrimination.

### Complaint Investigations

OCR's primary civil rights enforcement activity is complaint investigation. The number of civil rights complaints received by DOEd has dramatically increased, from less than 3,000 complaints annually in the early 1980s, to more than 5,000 complaints in fiscal years 1993 and 1994. Approximately one-quarter of these complaints alleged Title VI violations.[131]

Overall, OCR spends 342 work years (of a total of 862 work years) on processing complaints.[132] OCR devoted roughly the same number of work years to complaint processing in 1993 as in 1992,[133] even though the number of complaints it received increased from 4,432 to 5,090.[134]

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[126] Ibid., p. 4.

[127] Ibid., pp. 4–5.

[128] Ibid., p. 5.

[129] OCR officials stated that the new Complaint Resolution Manual has resulted, in the last year, in a streamlined complaint process, with the consequence that additional resources have been freed up for conducting compliance reviews. They indicated that the number of compliance reviews OCR performs has increased substantially. *See* Lim and Bowers January 1995 interview, pp. 2, 3.

[130] Lim and Lahring interview. DOEd officials maintain that OCR's strategy is not to limit compliance reviews to specific priority issues, but rather to address the broader departmental mission of equal access to educational excellence in each compliance review. Targeting compliance reviews to priority issues is an effective use of limited resources available for comprehensive compliance reviews as long as OCR staff are able to discover, while onsite, potential deficiencies in a recipient program that may occur in an area outside of the priority issues.

[131] DOEd Survey, Q. 71, p. 45; OCR FY 1994 *Annual Report*, p. 2. *See also* table 5.2. Data for years before the 1980s were not available.

[132] DOEd FY 1994 Implementation Plan, Workload and Performance Data, pp. 30, 32.

As such, despite OCR's model compliance and enforcement program structure, the increasing number of complaints DOEd receives has forced OCR to devote increasing amounts of staff time to complaint investigations, reducing resources available for other enforcement procedures. Although OCR has made a significant effort, through its NES and its Strategic Plan, to focus its limited resources and maximize their effectiveness, OCR simply does not have sufficient civil rights staff to execute other enforcement activities than complaint investigations, such as preaward reviews, postaward desk audit reviews, compliance reviews, and staff training. In addition, since OCR's Title VI enforcement is based primarily upon complaint investigations and a limited number of indepth onsite compliance reviews, OCR has failed to review many DOEd funding programs for Title VI compliance.

In an effort to enhance the efficiency of OCR's complaint processing, OCR issued a *Complaint Resolution Manual* in November 1993.[135] A central component of this manual is an early complaint resolution system, which encourages parties to resolve their differences independently of OCR.[136] OCR officials believe the manual has benefited its complaint processing, because OCR staff now does not need to investigate a complaint unless the individual parties cannot agree. In addition, the manual authorizes several types of negotiation, enabling regional offices to become more proficient in resolving complaints.[137] OCR officials also subsequently indicated that the revised complaint processing system has permitted OCR to increase the number of compliance reviews performed.[138]

### Deficiencies, Remedies, and Sanctions

DOEd finds noncompliance in nearly 40 percent of its complaint investigations and more than one-half of its postaward compliance reviews. In virtually all of these cases, DOEd obtains corrective action commitments from recipients.[139] For example, in fiscal year 1993, OCR negotiated remedial agreements with several school districts to abandon discriminatory ability grouping practices, reached an agreement with New York City Public Schools to enroll a minority student in the gifted and talented program of his choice, and compelled a school district in Tennessee to remove an assistant principal and to provide racial sensitivity training to high school staff.[140] DOEd also obtained relief on behalf of 4,104 victims of discrimination in fiscal year 1993.[141]

DOEd also is relatively active in initiating administrative proceedings requisite to imposing sanctions on recipients. During 1993, DOEd deferred funding to two recipients for the first time since the early 1980s. In addition, over the past 5 years, DOEd initiated fund termination proceedings in five cases.[142] According to OCR officials, the use of fund deferral, pending the results of an investigation, gives recipients a powerful incentive to negotiate and achieve compliance.[143]

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[133] In 1992, OCR devoted 340 work years to complaint processing. DOEd FY 1993 Implementation Plan, Workload and Performance Data, p. 81.

[134] DOEd FY 1994 Implementation Plan, Workload and Performance Data, p. 31; DOEd FY 1993 Implementation Plan, Workload and Performance Data, p. 79.

[135] Office for Civil Rights, U.S. Department of Education, *Complaint Resolution Manual*, Nov. 30, 1993.

[136] Ibid.

[137] Lim and Bowers January 1995 interview, p. 2.

[138] Ibid., pp. 2, 3.

[139] DOEd FY 1994 Implementation Plan, Workload and Performance Data, pp. 32, 35.

[140] DOEd FY 1994 Implementation Plan, pp. 13–15.

[141] DOEd Survey, Q. 77, p. 50.

[142] Pierce June 1994 letter, pp. 5–6.

DOEd also referred three cases to the Department of Justice in 1994. Of these cases, two involved Title VI. In one case, OCR found that the San Juan, Utah, public schools were not providing adequate services to LEP students and referred the case to the Department of Justice.[144] In December 1994, DOEd referred a Georgia school desegregation case to the Department of Justice.[145] In that case, DOEd had conducted a compliance review in 1991 to determine whether the school district had achieved unitary status. The compliance review uncovered a number of serious violations of Title VI, including: 1) the district operated a segregated school for whites; 2) the district assigned students to classes in a discriminatory manner; and 3) the district sanctioned segregated extracurricular activities, such as proms.[146] OCR negotiated a voluntary compliance agreement with the district. However, in February 1994, a complaint was filed against the district. In investigating the complaint, OCR found that the district continued to use an ability grouping plan that fostered segregation and continued to sanction segregated proms, selection of separate homecoming kings and queens by race, and maintenance of racially segregated cheerleading squads.[147]

### Outreach and Education

OCR is engaged actively in public education and community outreach. For example, OCR publishes pamphlets informing the public about their rights under Title VI.[148] In addition, OCR conducts training workshops on civil rights issues at conferences sponsored by professional associations and beneficiary organizations, enabling DOEd to instruct numerous educators, administrators, policy makers, parents, students, and other individuals interested in and affected by Title VI. Many of OCR's regional offices also disseminate newsletters to school districts, colleges, and community groups.[149] According to OCR's Deputy Assistant Secretary:

> Outreach efforts are focusing on the dissemination of OCR policy and model programs/practices that work, and collaboration with community groups and parents to provide recipients and beneficiaries the tools and information needed to ensure equal access to education for all.[150]

OCR also maintains contact with community groups through a number of activities, including focus group meetings on Title VI-related issues, OCR-sponsored roundtable discussions, and speeches and booths at conferences and conventions of minority and education-oriented groups.[151]

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[143] Lim and Bowers September 1994 interview, p. 2.

[144] Pierce June 1994 letter, pp. 5–6.

[145] Lim and Bowers January 1995 interview, documents submitted, summary of OCR activities pertaining to the Johnson County School District (one page).

[146] Ibid.

[147] Ibid.

[148] Office for Civil Rights, U.S. Department of Education, *Education and Title VI: Title VI of the Civil Rights Act of 1964 Prohibits Discrimination Based on Race, Color, or National Origin in programs or Activities Which Receive Federal Financial Assistance*; this document was also printed in Spanish under the title, *La Educacion Y El Titulo VI*. Other DOEd Title VI pamphlets include: *Student Assignment in Elementary and Secondary Schools and Title VI: Title VI of the Civil Rights Act of 1964 Prohibits Discrimination in Assigning Students to Schools, Classes, or Courses of Study in Programs or Activities Which Receive Federal Financial Assistance*; *The Guidance Counselor's Role in Ensuring Equal Educational Opportunity*; *Historically Black Colleges and Universities and Higher Education Desegregation*; *How to File a Discrimination Complaint with the Office for Civil Rights*; and *Nondiscrimination in Employment Practices in Education*.

[149] Pierce June 1994 letter, pp. 7–8.

[150] Ibid.

Overall, OCR's community outreach and public education activities are designed to maintain an ongoing information exchange with affected communities. Such activities serve not only as a forum for OCR to educate the public about the nondiscriminatory policies and requirements of Title VI, but also for OCR to remain apprised of emerging civil rights issues concerning its funding recipients and beneficiaries.[152]

### Technical Assistance

OCR has an active technical assistance program targeted at State and local education agencies, postsecondary education institutions, professional associations, and program beneficiaries. OCR provides technical assistance to direct recipients either upon request or at OCR's initiative. In fiscal year 1993, OCR provided technical assistance to funding recipients on 646 occasions. On 498 of those occasions, such assistance was afforded in response to requests; on 148 occasions, it was initiated by OCR.[153]

DOEd's Strategic Plan emphasizes technical assistance as an important component of DOEd's Title VI enforcement.[154] Under the Strategic Plan, rather than using desk-audit reviews to discover recipients in need of technical assistance, OCR proactively provides technical assistance in the form of training to its recipients on the high priority issues in the Strategic Plan. Such issues include: racial, ethnic, and sexual harassment; equal educational opportunity for LEP students; overrepresentation of minorities in special education programs; lower ability groups or tracks; underrepresentation of minorities in math and science programs and gifted and talented programs; and elementary-secondary and higher education desegregation.[155]

According to OCR officials, regional offices provide technical assistance to recipients, generally in the form of training and workshops. In some cases, the interaction fostered by such assistance has resulted in the discovery of noncompliance in recipients' programs and, in turn, the negotiation of compliance agreements by recipients.[156]

## Oversight of Continuing State Programs

In accordance with the Department of Justice's regulations,[157] DOEd requires, as a condition for receiving funds, that continuing State programs provide statements of compliance with Title VI and methods of administration. States are required to develop methods of administration that demonstrate that the State has procedures and programs in place to ensure that both State-operated programs and subrecipient programs are in compliance with Title VI.[158] However, DOEd is not ensuring that States adhere to these requirements.[159] OCR officials indicated that although OCR intends to increase its reliance on States' compliance efforts and to enhance coordination of Title VI enforcement with States, OCR does not generally monitor States' compliance with these requirements.[160]

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[151] Ibid. DOEd provided a partial list of organizations with whom OCR has had recent contact. The list included most major national civil rights organizations, as well as education organizations and many educational organizations. Ibid, enclosure C, p. 130.

[152] Ibid., pp. 8–9.

[153] DOEd Survey, Q. 54, p. 36. DOEd's 1994 Civil Rights Implementation Plan indicates that OCR conducted 3,021 technical assistance deliveries, most of which were delivered over the telephone. DOEd FY 1994 Implementation Plan, p. 20.

[154] *Strategic Plan*, p. 1.

[155] Lim and Bowers January 1995 interview, p. 3.

[156] Lim and Bowers September 1994 interview, p. 5.

[157] 28 C.F.R. § 42.410 (1994).

[158] 34 C.F.R. § 100.4(b) (1994). *See also Compliance Officer's Manual*, pp. 6–7.

OCR routinely oversees State Title VI compliance activities under only one funding program, the vocational education program. DOEd's vocational education guidelines for Title VI[161] require every State operating vocational education programs receiving Federal financial assistance to institute a compliance program to ensure that the State and its subrecipients are complying with Title VI.[162] States are required to develop and submit to DOEd methods of administration and annual civil rights compliance reports describing their compliance program.[163]

In 1992 oversight of State vocational education compliance programs, formerly the responsibility of OCR's regional offices, was transferred to OCR headquarters.[164] At that time, OCR conducted a thorough review of the States' methods of administration and annual civil rights compliance reports and began the process of redesigning its review process.[165] Pursuant to the revised review process, OCR oversight of States is limited primarily to reviewing and commenting on their methods of administration and annual civil rights compliance reports, and providing technical assistance.[166] OCR indicated that it had determined that there was no need to conduct onsite compliance reviews of the States' vocational education programs.[167]

OCR maintains that its methods of administration activities are part of the Federal-State partnerships in which OCR provides States, through national conferences, distribution of materials, and meetings, with investigative guidance and training on important civil rights issues, laws, and policies.[168] According to DOEd officials, the States provide the first line of activity in determining whether educational programs comply with vocational guidelines and Title VI. When State efforts fail, OCR steps in with an enforcement action to ensure compliance with the law. OCR developed this level of involvement after reviewing the methods of administration (MOA) programs and identifying a more effective way to achieve civil rights compliance.[169] Although the States initially are in a better position than DOEd to review the activities of its subrecipients, DOEd remains ultimately responsible for its funding.

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[159] According to DOEd officials, OCR does not distinguish its enforcement efforts based on the types of DOEd recipients or the types of assistance programs. Although OCR relies on State educational agencies to ensure that their subrecipients comply with Title VI, DOEd officials stated that OCR is able to ensure compliance with Title VI by all recipients and subrecipients through complaint investigations and compliance reviews. However, OCR does engage the State in the process on any termination decision or referral to the Department of Justice for litigation against the State's subrecipient. Lim and Lahring interview. However, it is important for OCR to recognize in its compliance reviews the added responsibilities placed on States that administer programs operated by subrecipients.

[160] Lim and Bowers September 1994 interview, p. 4.

[161] In addition to addressing Title VI, the vocational education guidelines also pertain to Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (1988), and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988 & Supp. V 1993).

[162] 34 C.F.R. Part 100, Appendix B.II.B. (1994).

[163] *Id.* Appendix B.II.C.

[164] DOEd Survey, Q. 44, pp. 31–32.

[165] The purpose of the redesign is to improve OCR's methods of administration review procedures, taking into account over 10 years of experience in order to develop a more effective and efficient process for achieving civil rights compliance. Lim May 1995 letter, tab G.

[166] DOEd Survey, Q. 44, pp. 31–32.

[167] Pierce May 1994 letter. DOEd Survey, Q. 44, pp. 31–32.

[168] Ibid.

OCR explained that it does conduct onsite reviews of States' vocational education programs when "a state agency has been determined to have major deficiencies in its MOA compliance program and fails to take steps to correct the deficiencies."[170] OCR will issue a formal letter of findings and, if necessary, implement enforcement procedures, including fund termination procedures.[171] Also, when States are unable to negotiate voluntary compliance agreements with a recipient in noncompliance, OCR reviews the subrecipients and takes necessary steps to ensure compliance.[172] In light of the increasing reliance on States to administer Federal programs, OCR's redesign of the methods of administration process will focus on developing a more proactive and efficient monitoring system in order to ensure that subrecipients and subgrantees of DOEd funds are in compliance with Title VI.

OCR's failure to conduct regular onsite monitoring of States' Title VI compliance activities is a weakness in DOEd's Title VI program. In programs in which a funding agency provides Federal financial assistance exclusively to State agencies, rather than to direct recipients, the agency's primary function is to oversee and monitor Title VI enforcement as conducted by the relevant State agency. Although, in effect, the State agency is responsible for Title VI enforcement in the federally funded programs it administers, the funding agency remains ultimately accountable for ensuring nondiscrimination in those programs. For this reason, the agency must evaluate the quality of the Title VI enforcement effort conducted by the State recipients and provide assistance when possible. OCR's limiting of its oversight and monitoring activities to reviewing States' methods of administration and annual compliance reports rather than conducting onsite compliance reviews, as it does in its vocational education programs, is inadequate. OCR also must conduct onsite evaluation of the States' civil rights enforcement activities to ensure that their methods of administration are being executed properly. Merely reviewing documents prepared and submitted by the States will not ensure that compliance violations are discovered. Additionally, States must be subject to possible onsite investigations on a regular basis.[173]

## Staff Training

OCR's regional staff are provided civil rights training in the form of seminars; however, OCR did not indicate how often such training occurs or what type of training is involved.[174] DOEd's 1993 Civil Rights Implementation Plan reported generally that each regional office and each headquarters component of OCR had implemented a staff training plan for fiscal year 1993 and that each was allocated a budget for such training. The training for regional offices is designed to assist regional staff in conducting onsite compliance reviews, to educate new staff, and to enhance computer literacy.[175]

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[169] Lim and Lahring interview.

[170] Jeanette Lim, Director, Policy, Enforcement, and Program Service, Office for Civil Rights, U.S. Department of Education, note to Frederick D. Isler, Acting Assistant Staff Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, Apr. 28, 1995, p. 1 (hereafter cited as Lim April 1995 letter).

[171] Ibid.

[172] Ibid.

[173] OCR maintains that onsite compliance reviews are conducted on an "as needed" basis so as not to waste resources on routine reviews. Lim May 1995 letter, tab G.

[174] DOEd Survey, Qs. 49 and 50, p. 35.

[175] DOEd FY 1993 Implementation Plan, p. 7.

DOEd does not indicate, however, that its headquarters' and regional civil rights staff receive training specifically on Title VI-related policies, the relationship between Title VI and other civil rights responsibilities, or the nexus between the administration of the federally assisted programs and civil rights responsibilities. Without such training, DOEd cannot ensure that its civil rights staff is informed of current law and policy and internal administrative intricacies affecting the enforcement of Title VI.

## DOEd Reporting Requirements and Data Collection and Analysis

DOEd's data collection and analysis system is superior to that of other Federal agencies. DOEd actively collects data concerning its programs' participant and potential participant pools from its recipients to aid OCR in its Title VI enforcement policies and activities. The collection of this type of information is critical for discovering disparities among racial and ethnic groups in the rates and nature of their participation in federally funded programs that indicate potential violations of Title VI. As such, OCR has developed a sophisticated data collection and analysis mechanism, including, in particular, a civil rights survey, that greatly facilitates its Title VI enforcement efforts.

For example, OCR conducts surveys of educational institutions receiving Federal financial assistance, such as its Elementary and Secondary Civil Rights Survey, to obtain information on students by race, gender, and national origin. The Elementary and Secondary Civil Rights Survey, collected every other year, permits OCR to conduct statistical analyses on such issues as educational ability grouping and equal educational opportunity for national origin minority and Native American students with limited English proficiency.[176] OCR uses the data collected in such surveys to ascertain recipient schools' compliance with Title VI's equal opportunity mandate.[177]

## Planning: National Enforcement Strategy and the Strategic Plan

Perhaps the most notable accomplishment of OCR in recent years is its development of the National Enforcement Strategy (NES)[178] and its successor, the Strategic Plan. The NES and the Strategic Plan are unique examples of strategic planning by a Federal civil rights office.

The NES was designed to enable OCR, which was devoting increasing resources to complaint investigation, to maximize the usefulness of its remaining resources by creating "a comprehensive and well-coordinated program of policy development, staff training, compliance reviews, technical assistance, and policy dissemination."[179] In 1994, OCR replaced the NES with a Strategic Plan that OCR officials characterize as "more expansive" than the NES with a greater emphasis on strong remedies.[180] Unlike the NES, the Strategic Plan sets forth general management goals for OCR in three topic areas: the impact of available resources for civil rights on students' lives, empowering students and parents to resolve individual problems related to equal access to education, and recruiting and retaining expert OCR staff. The plan sets forth general policy goals under each topic and general short-term and long-term strategies for realizing such goals.[181]

According to the Strategic Plan, each year the Assistant Secretary for Civil Rights chooses several priority issues, which become the focus of OCR's enforcement activities other than those related to complaint investigation. In fiscal year 1993, these priority issues were: Equal Educational Opportunities for National Origin Minority and Native American Students Who are Limited-English-Proficient and Discrimination on the Basis of Sex in Athletic Programs.[182] OCR announced that priority issues for fiscal year 1994 would include the overinclusion of minority students in special education and low-track classes, admissions and testing bias, underrepresentation of females and minorities enrolled in mathematics and science and high-track gifted and talented classes, unequal access to educational programs for students with limited English proficiency, and desegregation in higher education.[183]

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[176] DOEd FY 1990 Implementation Plan, pp. 17–18.

[177] Ibid.

[178] Office for Civil Rights, U.S. Department of Education, "National Enforcement Strategy, FYs 1991–1992," Dec. 11, 1990 (hereafter cited as OCR National Enforcement Strategy).

[179] Ibid. In addition to guiding compliance reviews, the NES raises the priority of monitoring corrective-action plans and required a restructuring of OCR. Ibid.

[180] Lim and Bowers September 1994 interview, p. 6.

[181] U.S. Department of Education, Office for Civil Rights, "Office for Civil Rights Strategic Plan" (draft), July 22, 1994.

The Strategic Plan outlines an overall management philosophy for OCR, providing a foundation for future OCR civil rights enforcement policies and activities. The Strategic Plan alone does not constitute an enforcement plan. Although the Strategic Plan embodies general goals and directions, it does not describe enforcement strategies, procedures, and activities. It also does not specify measurable goals or target dates for their accomplishment. To translate the Strategic Plan into a working document, each OCR component develops annual operational enforcement plans based on the Strategic Plan, that do contain specific goals and milestones.[184]

OCR's reinvention planning is based on a "compass" that connects OCR's enforcement resources to their impact on students and the Strategic Plan.[185] The compass adjusts OCR's activities based on information and proof of discrimination, OCR's strategy and tactics for case development, the stakeholders and players, and the steps necessary to achieve the goal of providing equal access to educational excellence.[186] When OCR staff use the compass to adjust their case development activities, they ask questions such as "What is the nature of the harm to students?" and "How can I be resource smart and still achieve my objectives?" to ensure that all OCR activities affect the greatest number of programs and beneficiaries.[187]

### Civil Rights Implementation Plans

The Commission reviewed DOEd's Civil Rights Implementation Plans for the years 1990 through 1994. Although DOEd's Civil Rights Implementation Plans generally emulate the outline recommended by the Department of Justice's guidelines and include a significant amount of information about ongoing civil rights activities, they are not sufficiently detailed to facilitate assessment of DOEd's civil rights enforcement program by the Department of Justice or to serve as a comprehensive source of public information. DOEd's plans do not provide adequate information concerning OCR's organization, staffing, and resources; procedures for handling complaint investigations, preaward and postaward reviews, and compliance reviews; or the process for making resource allocation decisions.

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[182] DOEd FY 1993 Implementation Plan, p. 5.

[183] *See* "OCR Resolves to Increase Compliance Reviews This Year," *Education Daily*, vol. 27, no. 61, Mar. 30, 1994, pp. 1–3.

[184] Lim and Lahring interview.

[185] *See* Lim April 1995 letter.

[186] Office for Civil Rights, "Compass for Proactive Case Development and Prosecution," Office for Civil Rights Apr. 28, 1995 document submission (USCCR files).

[187] Ibid. Lim and Lahring interview.

Furthermore, they do not fulfill one of the major purposes envisioned by the Department of Justice: DOEd does not use the Civil Rights Implementation Plans as a management tool. In particular, DOEd's Civil Rights Implementation Plans' long-range goals, major objectives, and short-term objectives are underdeveloped. They are vague and generally do not "imply criteria for measuring accomplishments," as required by the Department of Justice.[188] For example, in DOEd's plans for 1991, 1992, 1993, and 1994, the section concerning long-range goals contains lengthy progress reports on the preceding year's accomplishments. These progress reports address OCR's activities during that preceding year; however, they do not evaluate OCR's progress in realizing its long-range goals. Furthermore, the plans' section concerning goals and objectives is not based upon DOEd's budget, staffing, and anticipated workload.[189]

OCR officials indicated that OCR does not use the Civil Rights Implementation Plans except as a tool for reporting to the Department of Justice. They suggested that it would be more informative for them to submit copies of documents actually used in their planning process, such as their Strategic Plan and their annual report to Congress. They also suggested that the Department of Justice should accept these as alternatives to OCR's submission of a Civil Rights Implementation Plan.[190]

## Findings and Recommendations

### Organization, Budget, Staffing, and Workload

#### Organization

**Finding:** The organizational structure of external civil rights enforcement at the U.S. Department of Education (DOEd) is exemplary. The head of the Office for Civil Rights (OCR) is an Assistant Secretary who reports organizationally

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[188] U.S. Department of Justice, "Guideline for Agency Implementation Plans Required by Executive Order 12250, 'Leadership and Coordination of Nondiscrimination Laws,'" p. 9 (hereafter cited as DOJ Implementation Plan Guideline).

DOEd's implementation plans for 1990–1993 contain 10 or more long-range goals and many more major objectives and short-term objectives. The goals and objectives encompass the entire range of DOEd's federally assisted program civil rights enforcement, but generally are worded in such a way that an observer would not be able to determine whether or not they have been accomplished. For instance, one short-term objective for fiscal year 1990 was to "issue guidance and provide for the enhancement of regional monitoring skills, as appropriate." DOEd FY 1990 Implementation Plan, p. 23.,

The major objectives and short-term goals do not appear to conform to DOJ's guidelines. DOJ's guidelines require that major objectives "imply criteria for measuring accomplishments," but DOEd's major objectives discuss only implementing DOEd's various enforcement responsibilities and do not include criteria for measuring DOEd's accomplishments. For instance, a major objective in the complaint processing area for all 4 years is "to process complaints based on established regulations, policies, and procedures." Ibid., p. 22.

DOEd's short-term objectives do not conform with DOJ's guidelines in their use of the term "Work Product." Based on the example given in DOJ's guidelines, the term Work Product is meant to indicate a finished product that represents the accomplishment of the short-term objective. For instance, if the short-term objective is "to develop a rating system for cases," the corresponding work product would be an "evaluation form for [rating] cases. DOJ Implementation Plan Guideline, p. 11. However, DOEd often uses the term "work product" to refer to ongoing activities of OCR. For example, the short-term objective "investigate issues raised in complaints and make a finding," is supported by the work product "letters of finding," but there is no mention of how many letters of finding were generated. DOEd FY 1993 Implementation Plan, p. 41.

For DOEd's 1994 Civil Rights Implementation Plan, DOEd substituted the goals of its strategic plan. However, as noted above, these goals are also very general. Furthermore, the performance measures in the strategic plan are vague. DOEd FY 1994 Implementation Plan, p. 5–11.

[189] *See* U.S. Department of Education, "Fiscal Year 1991 Civil Rights Implementation Plan," pp. 5–27 (hereafter cited as DOEd FY 1991 Implementation Plan); U.S. Department of Education, "Fiscal Year 1992 Civil Rights Implementation Plan," p. 7–37 (hereafter cited as DOEd FY 1992 Implementation Plan); and DOEd FY 1993 Implementation Plan, pp. 8–40; DOEd FY 1994 Implementation Plan, pp. 11–29.

[190] Lim and Bowers January 1995 interview, p. 3.

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to the Deputy Secretary, but reports directly to the Secretary for most matters. This structure ensures that civil rights enforcement is integrated fully into DOEd's mission, Strategic Plan, and programs. Because the Assistant Secretary has line authority over all staff engaged in civil rights enforcement, including those in DOEd's regional offices, she also can ensure that Title VI enforcement is implemented effectively and uniformly throughout the Department. In addition, OCR does not have responsibility for DOEd's internal civil rights activities. As a result, OCR is able to focus the needed attention and resources on Title VI compliance and enforcement.

A particularly important feature of OCR's organizational structure is its strong Policy, Enforcement, and Program Service, which provides OCR with the internal legal and policy support necessary for implementing an effective Title VI compliance and enforcement program. OCR's Policy, Enforcement, and Program Service works closely with DOEd's Office of General Counsel. While DOEd's Office of General Counsel fills a review function, OCR's own legal support team provides OCR with the autonomy necessary to establish civil rights policy for the Department.

Another important feature is OCR's Planning, Analysis, and Systems Service, which maintains OCR's information systems and conducts operational planning for the office. This service permits OCR to engage in effective enforcement planning. It also ensures that OCR has integrates data analysis fully into its Title VI enforcement.[191]

**Recommendation:** DOEd should retain the current organizational structure of its civil rights functions. In particular, DOEd should continue to ensure that external and internal Federal sector equal employment opportunity activities are conducted by separate offices with separate reporting authorities. Furthermore, DOEd should continue to assign an Assistant Secretary to fulfill its external civil rights enforcement functions. DOEd also should retain OCR's internal organizational structure, including its strong central offices, the Policy, Enforcement, and Program Service, and the Planning, Analysis, and Systems Service. Moreover, DOEd should retain OCR's regional structure, which allows staff who are in close proximity to DOEd's recipients and beneficiaries to conduct day-to-day Title VI enforcement and compliance activities. OCR should continue its coordination with DOEd' Office of General Counsel to ensure that OCR is familiar with the legal policy positions of the program offices.

### Budget, Staffing, and Workload

**Finding:** OCR's budget is earmarked in the DOEd appropriation, and OCR has a planning office and an information system for analyzing its allocation of resources. OCR tracks its staff resources through component enforcement and operational summary analyses. OCR tracks staff resources by issue areas and program activities, such as compliance reviews, complaint investigations, training, and focus groups and outreach. By using these analyses of specific civil rights activities, OCR can engage in the type of management planning necessary to ensure that Title VI is enforced effectively, as well as other civil rights statutes.[192]

**Recommendation:** OCR should continue to use its information management system to track its civil rights expenditures and resources separately for different civil rights activities. In addition to tracking staff resources, the system should permit OCR to track other budgetary resources such as travel, transcript services, and computer technology by both issue and program activity. In addition, OCR should expand the system to include resources devoted to other important civil rights activities, including preaward reviews, postaward reviews, and data collection and analysis. OCR should continue to use the information management system to prepare an annual civil rights enforcement plan, detailing specific goals and objectives, developing timetables for achieving them, and assigning specific resources to accomplish these goals and objectives. In developing the plan, OCR should consider the impact of diverting resources away from other civil rights activities as it plans for new civil rights initiatives. In addition, OCR should use the information system to analyze its Title VI workload in relation to the resources devoted to various civil rights activities and initiatives. OCR should use this information to justify its budget requests.

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[191] *See* p. 187.

[192] *See* p. 188.

**Finding:** OCR's workload, in particular the number of complaints it receives, has increased steadily over time, but OCR's budget and staff resources have fallen. Thus, OCR has had to accomplish its Title VI compliance and enforcement obligations with fewer resources. OCR has taken significant steps to streamline its Title VI compliance and enforcement process, through making better use of computer technology, developing a more efficient complaint processing system, and creating case management teams. However, the decline in OCR's budget and staffing, combined with its increased workload, has strained OCR's ability to fulfill its Title VI responsibilities. Budget and staffing cuts projected under the National Performance Review will place further pressure on OCR's effectiveness. OCR has begun to plan how to maximize the effectiveness of its diminished staff.[193]

**Recommendation:** DOEd should continue to seek ways of enhancing the effectiveness and efficiency of its staff and budgetary resources. At the same time, DOEd should monitor its decision to reduce OCR's budget and staffing under the National Performance Review. As OCR's budget and staffing decline over the next several years, DOEd and OCR should make quarterly assessments of OCR's civil rights enforcement program to ensure that the reductions do not hamper OCR's ability to ensure compliance with Title VI and other external civil rights statutes. The assessments should consider OCR's civil rights responsibilities, workload, and resources, as well as the resources needed to fulfill its mandatory civil rights obligations, such as conducting preaward reviews, postaward compliance reviews, and staff training, and providing technical assistance and public outreach and education. In addition, OCR should conduct an analysis to determine the resources necessary to meet current civil rights enforcement goals and objectives. Based on the outcome of these assessments, DOEd should request additional resources for OCR if necessary.

DOEd should also consider whether it can divert resources currently assigned to DOEd's program offices to OCR, particularly in light of the trend towards delegating to the States functions that formerly were implemented by the program offices. If DOEd program office staff are transferred to OCR, they should be provided with thorough civil rights training.

## Regulations, Guidelines, Policies, and Procedures

### Regulations

**Finding:** Although DOEd's Title VI regulations are generally sufficient for effective Title VI enforcement, DOEd has not updated the regulations to reflect the clarifications made by the Civil Rights Restoration Act of 1987. The regulations do not include the Civil Rights Restoration Act's clarified definition of covered programs or activities. In addition, the regulations do not reflect the full scope of DOEd's fund termination authority that DOEd employs in practice. The language of the regulations limits DOEd's fund termination authority to the particular program in which discrimination has been found and does not recognize DOEd's authority to terminate funds in programs "infected" by discrimination elsewhere in an institution. Thus, the regulations are inconsistent with the Civil Rights Restoration Act. Furthermore, they do not reflect DOEd's current practice of using both a "pinpointing" and an "infection" theory in its fund termination decisions.[194]

**Recommendation:** DOEd should revise its Title VI regulations 1) to include a definition of covered programs and activities that reflects the clear definition created by the Civil Rights Restoration Act, and 2) to make explicit its authority to terminate funding for a recipient's programs if the operation of those programs is "infected" by discrimination elsewhere in the recipient institution.

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[193] *See* p. 190.

[194] *See* p. 192.

**Finding:** DOEd has not revised the appendix to its Title VI regulations that lists the Department's programs covered by Title VI since 1980. As a result, the appendix no longer is an accurate list of DOEd programs covered by Title VI. Thus, DOEd recipients, intended beneficiaries, and members of the public may be unaware of which DOEd programs are covered by Title VI.[195]

**Recommendation:** DOEd should publish a complete, updated list of its federally funded programs annually in the *Federal Register*. In the alternative, DOEd should revise its regulations to make reference to a readily available source of information on DOEd's programs, such as the *Catalog of Federal Domestic Assistance* published by the Office of Management and Budget and the General Services Administration. DOEd should prepare and make readily available an expanded description of each program, detailing the purposes, the type (block grant program, continuing State program, categorical grant program), the eligible recipients, and the intended beneficiaries of the program. Such program descriptions will help to clarify which programs are covered by Title VI, recipients obligated to comply with Title VI, and individuals protected by Title VI's nondiscrimination requirements.

### Guidelines

**Finding:** DOEd has not issued Title VI guidelines for each of its federally assisted programs, as required by the Department of Justice. DOEd issues guidance for its programs through a number of different media. However, unless guidance exists for all programs and is readily available to recipients, program beneficiaries, and the public, information critical to effecting compliance with Title VI may not reach those responsible for complying. Furthermore, without adequate guidance, intended beneficiaries and members of affected communities may not have sufficient information on the extent of Title VI's nondiscrimination requirements in terms of their practical application to the specific DOEd program.[196]

**Recommendation:** OCR should review, for each of its federally funded programs, the Title VI guidance it has issued. OCR should ensure that adequate guidance exists for each program and that the guidance is made readily available to applicants, recipients, participants, beneficiaries, and the general public. If OCR determines that adequate Title VI guidance does not exist for a program, OCR should take steps to develop and disseminate the needed guidance.

Each program should have guidance similar to that provided for the vocational education programs. The guidance should provide program recipients and beneficiaries with program-specific interpretations of the Title VI compliance obligations. It should give examples pertaining to the particular program of compliance and noncompliance with Title VI under each program. Furthermore, the guidance should specify the obligations of recipients, including their obligation to conduct public outreach and education. The guidance should also contain specific data reporting requirements for recipients. Finally, the guidance should provide instructions on the specific information OCR should review and the civil rights analyses it should conduct in determining whether a program recipient is in compliance with Title VI.

### Policies

**Finding:** DOEd has an outstanding program of Title VI policy development. DOEd regularly issues policy memoranda and statements clarifying Title VI's application to its programs. Recent examples include DOEd's policies on educational opportunity for limited-English-proficient students, race-targeted financial aid, and racial harassment against students at institutions of higher education. In addition, DOEd codifies all letters of finding that constitute new policy. DOEd's policies are invaluable as a means of clarifying the practical application of Title VI to DOEd's programs, as well as DOEd's interpretations of Title VI's requirements with respect to controversial or emerging issues. However, DOEd has never issued a policy statement explaining the impact of the Civil Rights Restoration Act of 1987 on its Title VI enforcement program.[197]

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[195] *See* pp. 192–93.

[196] *See* p. 193.

**Recommendation:** OCR should continue its strong program of developing and issuing Title VI policies on a regular basis. As part of its ongoing efforts, DOEd should issue a policy statement formalizing its current Title VI coverage and fund termination practices, and providing program-specific examples for both coverage and termination.

### Procedures

**Finding:** Although DOEd recently issued a *Complaint Resolution Manual* outlining complaint investigation procedures, it does not have manuals explaining its procedures for other portions of the Title VI compliance and review process, including preaward and postaward reviews.[198]

**Recommendation:** OCR should develop a comprehensive procedures manual. The manual should delineate procedures for preaward reviews, postaward compliance reviews, complaint investigations, and effecting compliance. It should contain separate sections for different types of DOEd programs. For instance, the procedures for conducting a compliance review of a school district are very different from the procedures for conducting a compliance review of a college or university. For each type of program, the manual should indicate generally what types of information OCR should review and what types of civil rights analyses OCR should conduct in determining whether a recipient is in compliance with Title VI.

## Process of Title VI Enforcement

### Preaward Reviews

**Finding:** DOEd's preaward review system is extremely limited. DOEd conducts preaward reviews for only one of its federally assisted programs. As a result, DOEd provides funding without ensuring, beforehand, that recipients are in compliance with Title VI or that DOEd funds are being distributed on an equitable basis with respect to race, color, or national origin. However, under a 1994 statute, the General Education Provisions Act, DOEd has been given broad new authority to conduct preaward reviews. DOEd will commence requiring all applicants to submit information on how the applicant intends to ensure that its program will be conducted on an equal opportunity basis and the steps the applicant will take to remove barriers to participation in its program.[199]

**Recommendation:** DOEd should use the information required of applicants for DOEd funding to conduct preaward desk-audit reviews of applicants before granting assistance. To ensure that DOEd uses its new preaward review authority effectively, OCR should issue guidance on the types of information applicants must submit and what DOEd should look for in reviewing this information. OCR should provide comprehensive, formal training to the program office staff who will be responsible for conducting such reviews. This training should include sections on all of the external civil rights statutes for which DOEd is responsible, including Title VI, as well as specific information on how to conduct the reviews. In addition, OCR should monitor closely the program offices' conduct of preaward reviews. For instance, OCR should require that the program offices submit for its review preaward review reports detailing the information they reviewed and their rationale for findings to release or withhold funding from applicants.

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[197] *See* p. 198.

[198] *See* p. 196.

[199] *See* pp. 198.

Generally, DOEd should conduct preaward reviews on all applications for DOEd funding. However, given resource constraints, DOEd may decide not to conduct preaward reviews for recipients who have been reviewed by DOEd within the past 2 years and for whom DOEd does not have an indication of any problems. These recipients should be required to submit assurances of compliance with Title VI.

### Postaward Desk-Audit Reviews

**Finding:** Although DOEd conducts postaward desk-audit reviews to select recipients for onsite compliance reviews, DOEd does not have a system in place to conduct postaward desk-audit reviews as an alternative to onsite compliance reviews. Postaward desk-audit reviews have the potential of providing substantial information about the compliance status of recipients without using the resources necessary for onsite reviews. Thus, in choosing not to conduct such reviews, DOEd is forgoing a cost-effective enforcement mechanism that could help it to maximize the effectiveness of its limited resources.[200]

**Recommendation:** OCR should implement a system of postaward desk-audit reviews of recipients, including local school districts and colleges and universities. DOEd should use postaward desk-audit reviews as a means of uncovering obvious violations of Title VI as well as a means of selecting recipients for onsite compliance reviews. To permit such reviews, DOEd should require recipients to report the information necessary for it to conduct such reviews on an annual or semiannual basis. For school districts, DOEd should use the information submitted in its Elementary and Secondary School Civil Rights Survey. DOEd also should require school districts to submit periodic Title VI self-assessments to DOEd for review.

### Onsite Compliance Reviews

**Finding:** Despite determined steps by OCR to devote resources for onsite compliance reviews, the actual number of compliance reviews it performs has barely increased. Most DOEd recipients can expect never to be reviewed. As a result, DOEd's compliance reviews do not perform the function of encouraging recipients to comply voluntarily with Title VI in anticipation of an OCR review. However, for fiscal year 1996, OCR plans to dedicate 40 percent of its resources to proactive enforcement activities, such as compliance reviews. In addition, through its Strategic Plan, which targets compliance reviews according to OCR priority issues, OCR has taken effective steps to benefit a greater number of stakeholders through the reviews it does conduct. OCR provides its regional components with considerable latitude to target their proactive enforcement programs within DOEd's priorities to ensure equal access to educational excellence. OCR's compliance reviews are part of an integrated enforcement strategy that provides recipients with a clear understanding of what they must do to comply with Title VI as it applies to OCR's priority issues. The focus on priority issues poses the danger that OCR may not uncover critical problems in other areas.[201]

**Recommendation:** OCR should continue to conduct onsite compliance reviews as part of an integrated enforcement strategy based on priority issues. However, OCR should also continue to strive to dedicate additional resources for compliance reviews, and OCR should conduct comprehensive onsite reviews that assess a recipient's entire operation, not only its compliance with respect to priority issues.

### Deficiencies, Remedies, and Sanctions

**Finding:** DOEd is unique among Federal agencies in the degree to which it uses aggressively the administrative and other options available to compel compliance with Title VI. DOEd stands out as the only agency that makes more than infrequent use of its fund termination authority. In addition, DOEd has pioneered the use of fund deferral as a means of prompting recipients to comply with Title VI voluntarily. Finally, DOEd has referred several cases to the U.S. Department of Justice for litigation and has recommended that the Government participate as an *amicus curiae* in several court cases. DOEd's effective use of the options at its disposal conveys the message that it is committed to Title VI enforcement and gives DOEd recipients the incentive to take steps to enter compliance voluntarily.[202]

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[200] *See* p. 198.

[201] *See* p. 201.

**Recommendation:** Other Federal agencies should, when they encounter serious violations of Title VI, emulate DOEd and make effective use of all of the enforcement options available to them, including fund termination and deferral and referral of cases to the Department of Justice.

### Outreach and Education

**Finding:** OCR's public outreach and education program on Title VI is active and effective. DOEd initiates outreach and education through a variety of formats, including publishing pamphlets, disseminating newsletters, participating in conferences, and convening meetings with recipients and beneficiaries. OCR's outreach and education program provides continuous information on Title VI to the public on an ongoing basis and also permits OCR to remain apprised of emerging civil rights issues affecting DOEd's programs. Thus, OCR's outreach and education program is exemplary.[203]

**Recommendation:** Other Federal agencies should use the Department of Education's Title VI outreach and education program as a model when developing their own outreach and education programs.

### Technical Assistance

**Finding:** OCR has an active Title VI technical assistance program. OCR offers technical assistance upon request, but it also provides it proactively. Its technical assistance is well integrated into other aspects of its enforcement program. For instance, it offers technical assistance proactively on the priority issues identified as part of its Strategic Plan.[204]

**Recommendation:** Other Federal agencies should use the Department of Education's Title VI technical assistance program as a model when developing their own technical assistance programs.

## Oversight of Continuing State Programs

**Finding:** Oversight of continuing State programs is one of the weakest areas of DOEd's Title VI compliance and enforcement program. Except for the vocational education program, DOEd does not routinely monitor States' compliance with Title VI. DOEd neither collects from States nor reviews methods of administration showing how the States intend to ensure compliance with Title VI. It also does not require States to submit annual Title VI reports on their compliance status. Although DOEd does collect and review these documents for the vocational education program, it does not conduct onsite monitoring to ensure that the States are executing their methods of administration properly.[205]

**Recommendation:** OCR should implement a comprehensive monitoring program to ensure that continuing State programs receiving DOEd assistance are operated in compliance with Title VI. Each State should be required to submit for OCR review methods of administration showing how it intends to ensure that it and its subrecipients comply with Title VI. To assist the States in preparing the methods of administration, OCR should provide the States with program-specific guidance on the necessary elements of acceptable methods of administration. Furthermore, DOEd should require States to submit annual Title VI self-assessments. OCR's program guidance should specify the types of information States should include in the self-assessments. OCR should review each State's Title VI self-assessment and write a report indicating its findings and recommendations for improving the

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[202] *See* pp. 202–03.

[203] *See* pp. 203–04.

[204] *See* p. 204.

[205] *See* pp. 204–06.

State's Title VI compliance programs. If necessary, OCR should provide technical assistance to the States to assist them in coming into compliance. Finally, OCR should conduct periodic comprehensive onsite reviews of each State's Title VI compliance program to uncover any problems not revealed in the Title VI self-assessments.

### Staff Training

**Finding:** OCR provides civil rights training to its staff, both in headquarters and in the regional offices. However, OCR has not developed a comprehensive staff training strategy or plan to ensure that all staff are afforded regular and thorough training on the civil rights statutes that DOEd enforces, including Title VI, as well as a thorough grounding in DOEd's regulations, guidelines, polices, and enforcement procedures and necessary background on DOEd's federally funded programs.[206]

**Recommendation:** OCR should prepare a comprehensive staff training plan to ensure that all staff are trained fully in all necessary aspects of DOEd's civil rights enforcement program. New staff should be provided with formal training on all of the civil rights statutes DOEd enforces, on DOEd's federally assisted programs, and on DOEd's regulations, policies, guidelines, and enforcement procedures. In addition, civil rights staff should be given annual civil rights training to refresh and deepen their understanding of DOEd's civil rights enforcement program and to address emerging civil rights issues that apply to DOEd's programs. DOEd should base its staff training plan on an assessment of the training needs of all staff and allocate specific budgetary resources to staff training.

### Reporting Requirements and Data Collection and Analysis

**Finding:** DOEd's data collection and analysis system is superior to that of other Federal agencies. OCR has a headquarters office, the Planning, Analysis, and Systems Service, assigned to maintaining and analyzing civil rights data. DOEd actively collects and analyzes data, not only on participation in DOEd programs, but also on treatment of participants by race, color, and national origin. DOEd's implementation of the Elementary and Secondary Civil Rights Survey is an excellent example of civil rights data collection and analysis. Data from that survey are an essential component of DOEd's system of postaward reviews.[207]

**Recommendation:** DOEd should continue to place appropriate emphasis on data collection and analysis as an integral part of a civil rights compliance and enforcement program. Other Federal agencies should consider the DOEd model in developing their own data collection and analysis systems.

### Planning

**Finding:** DOEd engages in considerable planning of its external civil rights compliance enforcement program. The keystone of DOEd's planning is its Strategic Plan, which outlines an overall management philosophy for OCR, providing a foundation for OCR's civil rights policies and actions. Although the Strategic Plan alone does not serve as an enforcement plan, OCR's component offices each submit enforcement plans that describe specific enforcement strategies, goals, and objectives and assign resources to specific tasks. DOEd is unique among Federal agencies in that it has a separate headquarters office, the Planning, Analysis, and Systems Service, which maintains an information system and is responsible for DOEd's operational planning.[208]

**Recommendation:** DOEd should continue to use its information system and Planning, Analysis, and Systems Service to develop annual civil rights enforcement plans. These plans should be formulated based on an analysis of available resources, legal requirements, and projected workload. They should also contain timetables for achieving their specific goals and objectives, and should measure their accomplishments against plans from preceding years. Furthermore, OCR should assign specific resources to accomplish each goal and objective. In addition, OCR should submit these component enforcement plans to the Department of Justice as part of DOEd's Civil Rights Implementation Plan.

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[206] *See* p. 206.

[207] *See* pp. 187, 207.

[208] *See* pp. 187, 207–08.

Other Federal agencies, especially those with sizable civil rights staffs, should consider creating internal offices, such as DOEd's Planning, Analysis, and Systems Service, to maintain their information systems and to implement their own enforcement planning activities.

**Finding:** DOEd's Civil Rights Implementation Plan does not conform to the Department of Justice's "Guideline for Agency Implementation Plans Required by Executive Order 12250, 'Leadership and Coordination of Nondiscrimination Laws.'" It does not provide adequate information on DOEd's civil rights implementation and enforcement program for the Department of Justice to assess the program or for the public to understand it. Furthermore, DOEd regards the Civil Rights Implementation Plan as a reporting instrument rather than as a management tool, as envisioned by the Department of Justice.[209]

**Recommendation:** DOEd should integrate its management and strategic planning with its preparation of the Civil Rights Implementation Plan. The Civil Rights Implementation Plan should conform to the Department of Justice's guideline. It should contain a comprehensive description of DOEd's civil rights compliance and enforcement program, including information on budget, staffing, and workload. In addition, OCR should include each component's civil rights enforcement plan, containing detailed goals and objectives, milestones, and plans for accomplishing them. The goals and objectives should be based on an analysis of projected OCR's budget and staff resources, as well as its workload in various areas.

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[209] *See* p. 208.

## Chapter 6

# U.S. Department of Health and Human Services

The U.S. Department of Health and Human Services (HHS) provides financial assistance of $225 billion to 700,000 recipients through 210 programs.[1] This amount of financial assistance is approximately eight times more than that of the U.S. Department of Education (DOEd). However, HHS's civil rights budget is $22.2 million, approximately one-half that of DOEd. When HHS and DOEd were created out of the former U.S. Department of Health, Education, and Welfare (HEW), HEW's civil rights staff was divided between the two new departments, with HHS receiving approximately one-third of the staff. Over time, the staff of both departments has declined, and the current HHS staff of 297 continues to be roughly one-third as large as DOEd's.[2]

## The HHS Federally Assisted Programs

HHS administers numerous Federal assistance programs through its operating divisions.[3] Among these, HHS administers several types of assistance. For instance, HHS provides State-administered block grants and supervised grants to individuals. HHS also offers grants for biomedical research, provides categorical grants to individuals, and funds entities through health insurance reimbursement arrangements, such as medicare or medicaid.[4] The recipients of HHS financial assistance range from State and local governments, to private for-profit and not-for-profit institutions, to individuals. Some of these recipients may receive HHS funding through a number of different sources.[5]

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[1] U.S. Department of Health and Human Services, "Fiscal Year 1993 Civil Rights Implementation Plan," Workload and Performance Data, p. 11 (hereafter cited as HHS FY 1993 Implementation Plan).

[2] *See* Donna E. Shalala, Secretary, U.S. Department of Health and Human Services, letter to Mary F. Berry, Chairperson, U.S. Commission on Civil Rights, May 9, 1995, attachment A, p. 1 (hereafter cited as Shalala May 1995 letter). For FY 1996, the HHS, OCR authorized staff level is 274. Ibid.

[3] The operating divisions that administer Federal assistance programs are: the Administration on Aging; the Public Health Service (which includes the Substance Abuse and Mental Health Service Administration, the Agency for Toxic Substances and Disease Registry, the Centers for Disease Control and Prevention, the Agency for Health Care Policy and Research, the Food and Drug Administration, the Health Resources and Services Administration, the Indian Health Service, and the National Institutes of Health); the Administration for Children and Families; the Health Care Financing Administration; and the Social Security Administration. Office of the Federal Register and National Archives and Records Administration, *The United States Government Manual, 1994/95* (Superintendent of Documents: Washington, D.C., 1994), pp. 300–38.

[4] U.S. Department of Health and Human Services, "Fiscal Year 1990 Civil Rights Implementation Plan," section I.D., p. 4 (hereafter cited as HHS FY 1990 Implementation Plan).

[5] Ibid. The FY 1990 Implementation Plan is the HHS base-year plan and describes in detail the HHS's Title VI enforcement structure, activities, and goals for the next four years. The 1991, 1992, and 1993 Implementation Plans are updates to the 1990 Plan.

## Organization, Budget, Staffing, and Workload of the HHS Civil Rights Enforcement Function

### Organization

The primary civil rights office at HHS is the Office for Civil Rights (OCR), which is headed by a Director who reports directly to the Secretary of HHS.[6] The Director also serves in the capacity of Special Assistant to the Secretary for Civil Rights.[7] OCR is responsible for enforcing Title VI, as well as civil rights provisions in other Federal statutes pertaining to federally assisted and federally conducted programs.[8] OCR does not have responsibility for HHS's internal equal employment opportunity program related to Title VII of the Civil Rights Act of 1964.[9]

OCR consists of headquarters offices and 10 regional offices.[10] OCR's headquarters has two main offices: the Office of Management Planning and Evaluation[11] and the Office of Program Operations.[12] A Policy and Special Projects Staff and an Executive Secretariat also report directly to the Director.[13] Headquarters staff provide policy guidance and operational direction to OCR's regional offices.[14]

OCR's 10 regional offices report to the head of the Office of Program Operations. The regional offices conduct complaint investigations and preaward and postaward reviews, as well as outreach activities to encourage voluntary recipient compliance.[15] Approximately two-thirds of OCR's staff are located in its regional offices.[16]

Generally, the organizational structure of the HHS civil rights enforcement activities is satisfactory for Title VI enforcement. With the exception of the legal support staff who work out of the Civil Rights Division of the HHS Office of the

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[6] U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Health and Human Services, Q. 20, p. 17 (hereafter cited as HHS Survey).

[7] Shalala May 1995 letter, attachment A, p. 1.

[8] These are: section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988 & Supp. V 1993); Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (1988); Age Discrimination Act of 1975, 42 U.S.C. §§ 6101–6107 (1988); Communications Act of 1934, 47 U.S.C. §§ 35, 151–155, 201–221, 301–329, 401–416, 501–505, 601–609 (1988); Titles VI, VII, VIII, and XVI of the Public Health Service Act, 42 U.S.C. §§ 201–300aaa–13 (1988 & Supp. V 1993); section 407 of the Drug Abuse Treatment Act of 1972, 21 U.S.C. § 1101 (1988); section 321 of the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970, 42 U.S.C. §§ 218, 246, 2688h, 2688j–2, 2688t, 4551, 4552, 4561, 4571, 4581, 4582, 4591 to 4593 (1988); the nondiscrimination provisions of the Omnibus Budget Reconciliation Act of 1981, Pub. L. 97–35, 95 Stat. 357 (codified as amended in scattered sections of U.S.C.; section 307 of the Family Violence Prevention and Services Act, 42 U.S.C. §§ 10,401–10,415 (1988); and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12,131–12,165 (Supp. V 1993). *See* HHS Survey, attachment to Q. 22, p. 18.

[9] HHS Survey, Q. 21, p. 17.

[10] U.S. Department of Health and Human Services, Office for Civil Rights, Organizational Chart, February 1994, submitted to the U.S. Commission on Civil Rights as an attachment to HHS Survey.

[11] The Office of Management Planning and Evaluation is divided into the Budget and Administrative Services Division, the Management Information and Analysis Division, and the Quality Assurance and Internal Control Division. Ibid.

[12] The Office of Program Operations is divided into the Investigations Division, the Program Development and Training Division, and the Voluntary Compliance and Outreach Division. Ibid.

[13] Ibid.

[14] HHS FY 1990 Implementation Plan, section I.D., p. 4.

[15] Ibid.

[16] HHS Survey, Qs. 35, 37, pp. 30, 32.

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General Counsel, the Director of OCR has direct authority over all HHS staff[17] engaged in external civil rights enforcement activities, even those in the HHS regional offices. Furthermore, because OCR does not have internal civil rights responsibilities, OCR is able to focus solely on external civil rights compliance. Thus, the organizational structure of OCR should facilitate the Director's ability to implement a comprehensive Title VI enforcement program.

### The Role of the HHS Operating Divisions

HHS states that the HHS operating divisions have some Title VI responsibilities.[18] However, in reviewing survey responses submitted by the operating divisions, the Commission determined that the operating divisions are not actively engaged in Title VI enforcement.[19] None of the operating divisions that provided the Commission with survey responses has a separate civil rights office for external civil rights compliance. Several of the operating divisions delegate Title VI enforcement responsibilities to their equal employment opportunity office.[20] Others transfer the duties to their grants management office.[21] None of the operating divisions has a full-time staff member assigned to Title VI.[22]

The operating divisions' current role is limited generally to ensuring that recipients provide necessary assurances of nondiscrimination before receiving Federal assistance.[23] However, none of the operating divisions requires applicants to submit sufficient information in their applications to determine their Title VI compliance status,[24] and none conducts Title VI preaward reviews of their applicants.[25] The operating divisions generally do not conduct postaward reviews, either desk audit or on site, education and outreach, or technical assistance related to Title VI.[26] At least one operating division demonstrated complete inexperience with Title VI by stating that it would refer Title VI complaints to the Office of Federal Contract Compliance Programs.[27] In sum, other than ensuring that recipients provide the necessary assurances of nondiscrimination, the operating divisions perform no Title VI enforcement role.

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[17] Except those in the HHS operating divisions. *See* discussion, pp. 220–22, below.

[18] HHS FY 1990 Implementation Plan, section I.D., p. 5. According to HHS's FY 1990 Implementation Plan, operating divisions "are responsible for incorporating civil rights components into their program operations." Ibid.

[19] *See* U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Health and Human Services, Health Resources and Services Administration; U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Health and Human Services, Agency for Health Care Policy and Research; U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Health and Human Services, Administration for Children and Families; U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention; U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Health and Human Services, Food and Drug Administration; U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Health and Human Services, National Institutes of Health; U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Health and Human Services, Substance Abuse and Mental Health Administration.

[20] *See* HHS/Health Resources and Services Administration Survey, p. 4; HHS/Agency for Health Care Policy and Research Survey, p. 4; HHS/Substance Abuse and Mental Health Administration, p. 4; and HHS/Administration for Children and Families, Q. 20, p. 16.

[21] *See* HHS/Centers for Disease Control and Prevention Survey, p. 4.; HHS/Food and Drug Administration Survey, p. 4; HHS/National Institutes of Health Survey, p. 4.

[22] HHS/Agency for Health Care Policy and Research Survey, Q. 23, p. 17; HHS/Administration for Children and Families Survey, Q. 23, p. 16. The other operating divisions did not respond to Question 23.

[23] HHS/Health Resources and Services Administration Survey, Q. 42, p. 32; HHS/Agency for Health Care Policy and Research Survey, Q. 42, p. 32; HHS/Substance Abuse and Mental Health Administration Survey, Q. 42, p. 32; HHS/Administration for Children and Families Survey, Q. 42, p. 32; HHS/Center for Disease Control Survey, Q. 42, p. 32; HHS/Federal Drug Administration Survey, Q. 42, p. 32; HHS/National Institutes of Health Survey, Q. 42, p. 32; HHS/Substance Abuse and Mental Health Administration Survey, Q. 42, p. 32.

OCR has little contact with and no line authority over the activities of the operating divisions.[28] Thus, to the extent that the operating divisions take on Title VI enforcement responsibilities, their activities are not overseen or guided by OCR, the office with primary responsibility for Title VI enforcement in HHS. Recently, however, OCR has taken steps to improve its coordination with the operating divisions. In developing its Strategic Plan, OCR consulted with the operating divisions.[29] The Director of OCR indicated that OCR also plans to work in conjunction with the operating divisions in a number of Title VI enforcement areas, including policy development and monitoring State recipients.[30] OCR plans to "seek innovative means for expanding partnerships for civil rights awareness and implementation throughout the Department's programs" and to "integrate civil rights into the ongoing operations and oversight of all HHS programs."[31] OCR's Strategic Plan, which the Secretary of Health and Human Services approved on January 20, 1995,[32] demonstrates an intention to increase operating division awareness of civil rights compliance matters through provision of training for managers and staffs.

Despite these prospective efforts to increase the collaboration of OCR and the operating divisions, OCR's Director will continue to lack direct authority over the operating divisions on matters related to Title VI. Hence, specific procedures delineating the relative responsibilities of

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[24] HHS/Health Resources and Services Administration Survey, Q. 43, p. 33; HHS/Agency for Health Care Policy Research Survey, Q. 43, p. 33; HHS/Administration for Children and Families Survey, Q. 43, p. 33; HHS/Centers for Disease Control Survey, Q. 43 p. 33; HHS/Food and Drug Administration Survey, Q. 43, p. 33; HHS/National Institutes of Health Survey, Q. 43, p. 33; HHS/Substance Abuse and Mental Health Administration Survey, Q. 43, p. 33.

[25] HHS/Health Resources and Services Administration Survey, Q. 42, p. 32; HHS/Agency for Health Care Policy Research Survey, Q. 42, p. 32; HHS/Administration for Children and Families Survey, Q. 42, p. 32; HHS/Centers for Disease Control Survey, Q. 42 p. 32; HHS/Food and Drug Administration Survey, Q. 42, p. 32; HHS/National Institutes of Health Survey, Q. 42, p. 32; HHS/Substance Abuse and Mental Health Administration Survey, Q. 42, p. 32.

[26] *See* HHS/Health Resources and Services Administration Survey; HHS/Agency for Health Care Policy Research Survey; HHS/Administration for Children and Families Survey; HHS/Centers for Disease Control Survey; HHS/Food and Drug Administration Survey; HHS/National Institutes of Health Survey; HHS/Substance Abuse and Mental Health Administration Survey.

[27] HHS/Health Resources and Services Administration, Q. 58, p. 39.

[28] *See* U.S. Department of Health and Human Services, *Report of the HHS Civil Rights Review Team*, September 1993, pp. 22–23 (hereafter cited as *HHS Civil Rights Review Report*).

[29] The Secretary of Health and Human Services noted, "To ensure that all the divisions within the Department have a stake in the success of OCR, they were instructed to participate in the study of OCR and in the development of the OCR strategic plan." Shalala May 1995 letter, p. 1.

[30] *See* Dennis Hayashi, Director, Office for Civil Rights, U.S. Department of Health and Human Services, letter to Frederick D. Isler, Acting Assistant Staff Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, Nov. 4, 1994, enclosure, "Title VI Plans—Department of Health and Human Services" (hereafter cited as Hayashi letter, Title VI Plans).

[31] Hayashi letter, pp. 1–2.

[32] *See* U.S. Department of Justice, Civil Rights Division, "Health and Human Services Strategic Plan Approved," *Civil Rights Forum*, vol. 9, no. 1 (Spring 1995).

**TABLE 6.1**
**U.S. Department of Health and Human Services' Civil Rights Budget and Staffing: 1981–1993***

| | 1981 | 1984 | 1988 | 1992 | 1993 |
|---|---|---|---|---|---|
| Budget | | | | | |
| Millions of $ | $19.8 | $21.3 | $20.2 | $22.3 | $22.2 |
| Millions of constant $ | $25.2 | $23.3 | $19.5 | $18.6 | $18.5 |
| Staff | | | | | |
| Civil rights staff | 524 | 437 | 344 | 326 | 309 |
| Title VI staff | 246 | 135 | 123 | 116 | 108 |

*HHS does not maintain data for the years before 1981. Source: U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Health and Human Services, Q. 33, p. 27; Q. 35(c), p. 30; Q. 36(b), p. 31. HHS does not maintain these data for years before 1981. Note: To calculate the constant-dollar figures, the nominal dollar amounts were adjusted using a price index for government services developed by the U.S. Department of Commerce, Bureau of Economic Analysis, as reported in President of the United States, *Economic Report of the President* (Superintendent of Documents: Washington, DC, 1995), table B-3, p. 279. The base year for the price index is 1987.

OCR and the operating divisions will be necessary to ensure effective Title VI enforcement throughout HHS.

### Budget, Staffing, and Workload of OCR

OCR's budget is earmarked in the HHS appropriation,[33] but there is not a separate budget for Title VI enforcement.[34]

Although OCR did not experience actual dollar reductions in its budget during the 1980s, its inflation-adjusted budget was severely reduced. OCR's budget rose from $19.8 million in 1981 to $20.2 million in 1988. It rose again to $22.3 million in 1992 and declined slightly to $22.2 million in 1993.[35] However, after correcting for inflation, OCR's budget fell by 26 percent between 1981 and 1993.[36] Furthermore, its staff size diminished considerably over time, from approximately 524 in 1981, to 309 in 1993.[37] OCR staff assigned to Title VI enforcement also declined over that period, from 246, almost one-half of the total OCR staff in 1981, to 108, roughly one-third of the total OCR staff in 1993.[38]

OCR began implementing an "aggressive streamlining plan" during fiscal year 1994. According to the plan, OCR will increase the proportion of full-time equivalent positions (FTEs) allocated to the regions, reduce the number of headquarters staff, and eliminate as many levels of management as possible in both the regions and the headquarters offices.[39] To implement its streamlining plan, OCR afforded 12 OCR staff members, including 10 staff members performing headquarters or supervisory functions, a "buyout" offer of voluntary separation incentive payments in May 1994. OCR subsequently made an "early-out" offer, open for acceptance through June 30, 1994.[40] In March 1995, the agency granted an additional 19 buyouts to staff, principally headquarters managers, and an early-out period through the end of September 1995.[41]

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[33] HHS Survey, Q. 29, p. 23.

[34] Ibid.

[35] Ibid., Q. 33, p. 27. *See also* table 6.1. HHS does not maintain data for years before 1981.

[36] *See* table 6.1. HHS does not maintain data for years before 1981.

[37] HHS Survey, Q. 35, p. 30. *See also* table 6.1.

[38] HHS Survey, Qs. 35, 36, pp. 30–31. *See also* table 6.1. HHS does not maintain data for years before 1981.

To increase its FTEs at the regional level, OCR authorized its regional offices to hire an additional 13 nonsupervisory equal opportunity specialists during the fourth quarter of fiscal year 1994. According to OCR's Director, "[t]hese staff are OCR's principal customer service contact staff, and their addition to our regional offices' FTEs helps strengthen the Department's civil rights program."[42]

OCR maintains that its workload has escalated,[43] in part, because OCR has "more authorities to cover."[44] However, as its civil rights responsibilities expanded, HHS's budget, in real terms, and staff resources for Title VI enforcement decreased. Currently, they are far less than those of DOEd, which provides considerably less financial assistance than HHS. Overall, HHS's Title VI enforcement program suffers from inadequate staff and resources, and its civil rights staff is small relative to the amount of financial assistance HHS awards.

## Regulations, Guidelines, Policies, and Procedures

### Regulations

HHS has regulations that are specific to implementation and enforcement of Title VI.[45] Because these regulations were not revised when HHS became a separate department in 1980,[46] they are essentially identical to DOEd's. This is critical because it signifies that HHS has hardly developed its Title VI enforcement program since its creation in 1980. In addition, certain sections of the HHS Title VI regulations pertain specifically to educational institutions and are, therefore, apparently irrelevant to HHS activities. For example, the regulations contain a provision requiring assurances from elementary and secondary schools, and a section that provides an illustrative example pertaining to construction aid and general support for elementary and secondary schools.[47]

Because HHS's regulations are identical to DOEd's,[48] the HHS Title VI regulations, like DOEd's Title VI regulations:

- allow a finding based on disparate impact,[49]
- prohibit employment discrimination in programs whose purpose is not to provide

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[39] Hayashi letter, Title VI Plans, p. 1.

[40] Ibid.

[41] Shalala May 1995 letter, attachment A, p. 1.

[42] Hayashi letter, Title VI Plans, p. 1.

[43] HHS Survey, Q. 27, p. 22.

[44] Ibid., Q. 28, p. 23. HHS does not specify in its survey response what additional authorities it has had to cover in the past five years. Certainly one such authority is the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12,101–12,213 (Supp. V 1993).

[45] 45 C.F.R. Part 80 (1994).

[46] *See id.* HHS's Title VI regulations (formerly HEW's) were last revised in 1973.

[47] *See, e.g.*, 45 C.F.R. §§ 80.4(c), 80.5(b) (1994).

[48] *See* chapter 5, pp. 190–93, for a discussion of the Department of Education's Title VI regulations.

[49] 45 C.F.R. § 80.3(b)(2)-(3) (1994).

employment when such discrimination causes discrimination in the program,[50] and

- broadly permit, but do not require, affirmative action, except in programs that have previously discriminated.[51]

HHS has not updated these regulations to reflect the amendment to Title VI created by the Civil Rights Restoration Act of 1987.[52] The act amended the definition of "programs or activities" to restore broad coverage for Title VI's nondiscrimination provision.[53] In addition, the legislative history indicates that the act left intact the fund termination remedy available when discrimination is "pinpointed" to the program or activity receiving Federal financial assistance, or when the federally assisted program is "infected" by discrimination elsewhere in the operations of the recipient.[54]

The regulations also do not specifically address the HHS block grant programs.[55] Although, in 1986, HHS proposed a rule on nondiscrimination requirements applicable to block grants,[56] that rule has never been issued in final form. The proposed rule specifies that the HHS block grant programs are covered by previous nondiscrimination statutes, including Title VI.[57] It requires HHS to notify the chief executive officer, or Governor, of the State receiving the block grants when HHS has found a funding recipient in noncompliance.[58] The Governor must be afforded 60 days to secure a voluntary compliance agreement. If he or she fails to do so, HHS "will effect compliance in according with [the procedures outlined in section 80.8 the HHS Title VI regulations]."[59]

### Guidelines

Since its creation as a separate entity from the Department of Education, HHS has not published any Title VI guidelines for its federally assisted programs as required by the U.S. Department of Justice.[60]

### Policies

OCR has provided a limited development of Title VI policy for HHS-funded programs. Since 1980, when HHS was created, OCR has issued only 10 policy memoranda or statements. When HHS was formed, it lacked individual civil rights policies, precedents, standards, and procedures necessary to operate an effective civil rights enforcement program. Efforts to establish such foundations have never been completed.[61]

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[50] *Id.* § 80.3(c).

[51] *Id.* § 80.3(b)(6)(I).

[52] Pub. L. No. 100–259, 102 Stat. 28 (codified as amended at 20 U.S.C. §§ 1681note, 1687, 1687note, 1688, 1688note (1988); 29 U.S.C. §§ 706, 794 (1988 & Supp. 1993); 42 U.S.C. §§ 2000d–4a, 6107 (1988)).

[53] U.S. Congress, Senate, Committee on Labor and Human Resources, *Civil Rights Restoration Act of 1987*, 100th Cong., 2d sess., S. Rep. No. 64, p. 1, *reprinted in* 1988 U.S.C.C.A.N. 3.

[54] 1988 U.S.C.C.A.N. at 22. For a further discussion and analysis of the effects of the Civil Rights Restoration Act, see chap. 2, pp. 36–40.

[55] HHS operates the following block grant programs: Preventive Health and Health Services Block Grant, 42 U.S.C. §§ 300w to 300w–9 (1988 & Supp. V 1993); Alcohol and Drug Abuse and Mental Health Services Block Grant, 42 U.S.C. §§ 300x to 300x–13 (1988 & Supp. V 1993); Maternal and Child Health Services Block Grant, 42 U.S.C. §§ 701–709 (1988 & Supp. V 1993); Low Income Home Energy Assistance Block Grant, 42 U.S.C. §§ 8621–8629 (1988 & Supp. V 1993); and Community Services Block Grant, 42 U.S.C. §§ 9901–9912 (1988 & Supp. V 1993).

[56] 51 Fed. Reg. 2,806 (1986). HHS has also developed a proposed rule regarding national origin discrimination against persons with limited English proficiency. 58 Fed. Reg. 56,294 (1994) (unified agenda).

[57] *Id* at 92.11.

[58] *Id.* at 92.4.

[59] *Id.*

[60] *See* 45 C.F.R. Part 80, App. B (1994). Like DOEd, HHS has adopted HEW's guidelines for vocational education programs. *Id.* However these guidelines pertain to programs that are under DOEd and not under HHS.

Due to the Secretary's concern about how the Department's civil rights efforts were affected during the 1980s, she charged an intradepartmental team to review HHS civil rights implementation.[62] According to that team's assessment, OCR suffered from low morale, an emphasis on "paperwork" at the expense of accomplishments, regular disputes among staff at all levels, and inconsistent enforcement efforts.[63] The team determined that "[o]ne of the most crippling factors that has prevented the Office for Civil Rights and other components of the Department from mounting and sustaining an effective civil rights program has been the absence of clear definitions, or standards, of what constitutes discrimination."[64] Moreover, to the extent that HHS does develop policy, according to the Civil Rights Review Team, such policy is not communicated effectively to OCR staff.[65] Consequently, "the substance of civil rights protection (i.e., what constitutes discrimination and how to discover, prevent, or remedy it) has been largely left undefined and to the discretion of each investigator, manager, reviewer and attorney throughout the organization."[66] HHS's failure to develop and communicate its policy to staff is likely to result in inconsistent and incorrect findings by staff. However, the agency has taken an important step to reduce the possibility of incorrect findings by assigning a regional civil rights attorney to each of its 10 offices.[67]

In recent years, HHS has demonstrated an increasing interest in Title VI policy development. Two of the most recent policy memoranda explain OCR's jurisdiction over employment discrimination under Title VI[68] and analyze the effect of the Civil Rights Restoration Act of 1987 on OCR's compliance program.[69] The latter indicates that the Civil Rights Restoration Act should make HHS's jurisdiction easier to establish. However, it does not address the need for revising the HHS regulations to create consistency with the act's amendment of Title VI.[70]

Under OCR's new Strategic Plan, the agency intends to develop staff training on standards of evidence, revise the *Investigative Procedures Manual*, and work with partners in the operating divisions to develop clear standards for programs to use in assessing potential discriminatory practices. In particular, OCR has recently contracted with the Indian Health Service for development of a Title VI investigative and analytical methodology to be used as a training module.

### Procedures

HHS revised its *Investigative Procedures Manual* in 1993. That manual covers procedures for conducting complaint investigations, compliance reviews, preaward reviews for medicare providers, and for implementing its block grant compliance program.[71] The procedures concerning block grants outline methods for contacting States' chief executive officers and affording them the opportunity to resolve situations of noncompliance within their States' assistance programs.[72] If a chief executive officer fails to achieve compliance, the standard HHS Title VI procedures are utilized to effect compliance.[73] The section on block grants does not contain specialized procedures for investigating complaints or for conducting compliance reviews in block grant programs.[74]

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[61] *HHS Civil Rights Review Team Report*, pp. 1–2.

[62] Shalala May 1995 letter, attachment A, p. 2.

[63] *HHS Civil Rights Review Team Report*, pp. 1–2.

[64] Ibid., pp. 19–20.

[65] Ibid., p. 10.

[66] Ibid., p. 1.

[67] Shalala May 1995 letter, attachment A, p. 2.

[68] Grover G. Hankins, Principal Deputy General Counsel and Acting Associate General Counsel, Civil Rights Division, Office of the General Counsel, U.S. Department of Health and Human Services, HHS, memorandum to Ronald G. Copeland, Associate Deputy Director, Office of Program Operations, U.S. Department of Health and Human Services, May 3, 1991.

[69] Grover G. Hankins, Principal Deputy General Counsel and Acting Associate General Counsel, Civil Rights Division, Office of the General Counsel, U.S. Department of Health and Human Services, memorandum to Ronald G. Copeland, Associate Deputy Director, Office of Program Operations, U.S. Department of Health and Human Services, 1991 (precise date illegible).

[70] Ibid.

## Process of Title VI Enforcement

OCR's staff is disproportionately small relative to the amount of Federal financial assistance HHS distributes.[75] In addition, OCR does not utilize its current staff efficiently. Like DOEd's OCR, HHS's OCR devotes a large number of its staff resources to complaint investigations.[76] It conducts a substantial number of preaward reviews, although a small number in comparison to the total sum of 700,000 HHS-funded recipients, leaving few resources for postaward compliance reviews. For example, in fiscal year 1993, OCR initiated only 12 postaward onsite compliance reviews[77] of all HHS funding recipients.[78] However, recently HHS implemented a new process of conducting limited scope reviews. OCR began 85 of these reviews in FY 1993 and 124 in FY 1994. Those reviews resulted in an additional 89 onsite investigations.[79]

### Preaward Reviews

HHS operating divisions do not conduct preaward reviews although most of them require assurances of nondiscrimination.[80] OCR conducts preaward reviews for HHS. However, it performs these reviews on new medicare applicant facilities and medicare providers only.[81] As a result, many of HHS's other federally assisted program applicants and recipients receive funds without undergoing a preaward review process to ensure compliance with Title VI and nondiscrimination

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[71] U.S. Department of Health and Human Services, Office for Civil Rights, *Investigative Procedures Manual*, March 1993 (hereafter cited as *Investigative Procedures Manual*).

[72] Ibid., chapter XI, pp. XI-1—XI-6.

[73] 51 Fed. Reg 2,806 (1986) at 92.4.

[74] *See Investigative Procedures Manual*, Chapter XI, pp. XI-1—XI-6.

[75] On October 11, 1994, the Commission requested updated information on HHS Title VI enforcement activities for fiscal year 1994. HHS submitted a response on November 1994. However, the response did not include any statistical data on HHS's Title VI enforcement in the areas of preaward review, desk audit reviews, onsite compliance reviews or complaint investigations. On May 9, 1995, HHS provided updated information on its Title VI enforcement activities, including some statistical data, in its official comments on the draft copy of the chapter which the Commission provided to HHS in March 1995.

[76] *See* HHS FY 1993 Implementation Plan, Workload and Performance Data, pp. 11, 15.

[77] HHS Survey, Q. 68, p. 51.

[78] HHS FY 1993 Implementation Plan, Workload and Performance Data, p. 11.

[79] Ibid., attachment A, p. 3.

[80] Survey responses were submitted by the Administration for Children and Families; the Agency for Health Care Policy and Research; the Centers for Disease Control and Prevention; the Food and Drug Administration; the Health Resources and Services Administration; the National Institutes of Health; and the Substance Abuse and Mental Health Administration. The Indian Health Service did not submit a survey response, but it submitted a copy of a memorandum of agreement delegating its Title VI enforcement responsibilities to the Health Care Financing Administration.

[81] *See HHS Civil Rights Review Team Report*, p. 11; HHS Survey, Q. 40, p. 34. *See also* Shalala May 1995 letter, attachment A, p. 3. HHS maintains that these recipients comprise a substantial portion of HHS's recipient universe. *See* Shalala May 1995 letter, attachment A, p. 3.

**TABLE 6.2**
**U.S. Department of Health and Human Services' Title VI Enforcement Activity: Preaward Reviews, Postaward Reviews, and Complaints Received 1981–1993***

| | 1981 | 1984 | 1988 | 1992 | 1993 |
|---|---|---|---|---|---|
| Preaward reviews | | | | | |
| Desk-audit | N/A | 3,259 | 2,340 | 2,580 | 3,073 |
| Onsite | N/A | 16 | 6 | 12 | 23 |
| Postaward reviews | | | | | |
| Desk audit | 37 | 37 | 38 | 6 | 7 |
| Onsite | 62 | 114 | 106 | 76 | 21 |
| Complaints | | | | | |
| All civil rights | 1,222 | 789 | †1,589 | †2,299 | †2,094 |
| Title VI | 350 | 230 | 285 | 377 | 340 |

*HHS does not maintain data for the years before 1981.
†These numbers were reported in the attachment to the May 1995 letter submitted by the Secretary of Health and Human Services to the Commission. The figures reported in the survey cited below were 1,191, 1,291, and 1,163, respectively.

Source: U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Health and Human Services, Q. 41(e),(f), p. 36; Q. 68(c), p. 51; Q. 71, p. 54.

in their programs. Without a preaward review mechanism, potential and actual program beneficiaries may experience the adverse effects of discriminatory practices before HHS can identify and address them at the postaward stage. Consequently, the limited focus of HHS's preaward review process impedes an effective Title VI compliance and enforcement program.

OCR's regional staff and headquarters investigative staff perform HHS's preaward reviews.[82] The number of reviews that OCR conducted fell considerably after 1984, when it performed a total of 3,275 such reviews. The number of preaward reviews appears to be rising again, however. In 1992, OCR conducted 2,592 preaward reviews.[83] The fiscal year 1993 total of 3,096 approaches the 1984 total.[84] It accomplished these reviews in 41 work years.[85]

The volume of preaward reviews performed by OCR annually would indicate that the desk-audit reviews are cursory. However, OCR's *Investigative Procedures Manual* provides detailed instructions concerning the process for conducting medicare preaward clearance reviews. Before clearance is granted, OCR staff must collect from the applicant and review data on:

- the racial and ethnic composition of the applicant's service area;
- the racial and ethnic composition of the applicant's contact staff by type of position held; and
- if the applicant's service area has more than

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[82] HHS Survey, Q. 25(e), p. 20.

[83] Ibid., Q. 41(e),(f), p. 36. *See also* table 6.2. HHS does not maintain data for years before 1984.

[84] HHS Survey, Q. 41(e),(f), p. 36. *See also* table 6.2. HHS does not maintain data for years before 1984. In later correspondence, HHS indicated that OCR performed 3,223 preaward reviews in FY 1993 and 3,658 reviews in FY 1994. Shalala May 1995 letter, attachment A, p. 3. No explanation was given for the discrepancy.

[85] HHS FY 1993 Implementation Plan, Workload and Performance Data, p. 21.

100 limited-English proficient (LEP) persons, the applicant's methods for serving LEP clients, including whether the applicant has bilingual contact staff.[86]

The staff also must collect and review additional data from hospitals, such as the number of beds, the number of patient admissions over a 2-week period by race and ethnicity, the number of LEP patients served, and the number of doctors associated with the hospital by race and ethnicity. Similar data are required for nursing homes, home health agencies, rural health agencies, hospices, and comprehensive outpatient rehabilitation facilities.[87] If a review of these data or other information obtained by staff suggests that the applicant might not be in compliance with Title VI, staff may conduct an onsite review of the applicant.[88]

However, the procedures manual does not explain staff's objective in reviewing these data. For instance, the manual does not state that staff should determine whether minority and nonminority participation in a recipient's program are comparable nor does it instruct staff to consider the recipient's staffing patterns for indications that there might be discrimination in the recipient's program delivery. Absent such provisions, comprehensive staff training is crucial to ensuring that OCR staff perform these preaward reviews efficiently and effectively.

### Postaward Desk-Audit Reviews

Given present staffing levels, conducting postaward desk-audit reviews would be an effective means of evaluating a sizable quantity of recipients. Because desk-audit reviews are less comprehensive than onsite reviews, they can be accomplished much more quickly and with fewer resources. They offer a cost-effective means for uncovering potential Title VI violations. However, OCR conducts few postaward desk-audit reviews relative to the number of HHS funding recipients. For example, in 1993, OCR completed only seven such reviews.[89]

OCR has sought alternative means for conducting postaward reviews in light of the dramatic increase in preaward reviews, coupled with the volume of complaints. Recently, OCR has initiated a new type of review referred to as the limited scope review. These reviews combine the features of the desk-audit review and onsite reviews. OCR screens recipients by desk audit to determine whether an onsite is appropriate. In FY 1993, OCR began 97 and completed 71 limited scope reviews.[90] Although this strategy enables OCR to increase the number of postaward reviews that it performs, the numbers conducted in FY 1993 indicate that OCR remains unable to reach a large percentage of its 700,000 funding recipients.

### Onsite Compliance Reviews

OCR's regional offices have primary responsibility for onsite compliance reviews of recipients.[91] OCR's compliance review procedures can be found in its *Investigative Procedures Manual*.[92] Recipients are targeted for compliance reviews based on a list of national priority issues developed by headquarters staff or if research or other information, such as lawsuits, complaints, or a history of noncompliance, suggests that they may have a compliance problem.[93]

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[86] *Investigative Procedures Manual*, ch. 18, p. 11.

[87] Ibid., pp. 11–12.

[88] Ibid., p. 4.

[89] HHS Survey, Q. 45(a), p. 40. *See also* table 6.2. The numbers given in the HHS survey response are different from the numbers in its Civil Rights Implementation Plans. For instance, the HHS survey indicated that HHS completed three postaward desk-audit reviews in 1992; whereas, the HHS's FY 1993 Implementation Plan reports 18 such reviews completed. *See* ibid; HHS FY 1993 Implementation Plan, Workload and Performance Data, p. 22.

[90] Shalala May 1995 letter, attachment A, p. 3. The 97 reviews for FY 1993 is a number contrary to the 85 reviews for FY 1993 reported above under "Process of Title VI Enforcement." HHS provided no explanation for this discrepancy in numbers.

[91] HHS Survey, Q. 25, pp. 20–21.

[92] *See Investigative Procedures Manual*, ch. 17.

OCR's staff is disproportionately small relative to the amount of Federal financial assistance HHS distributes. HHS's OCR has devoted the majority of its staff resources to complaint investigations and has devoted fewer resources to the other civil rights enforcement activities. As a result, in FY 1993 OCR began only 12 onsite compliance reviews and completed 21 compliance reviews. The previous 5 years averaged 99 such reviews and investigations per year.[94] As the agency increases its staffing levels in its regional offices, this number is expected to increase. Additionally, through its Strategic Plan pilot projects, OCR is working to reduce staff time allocated to complaint processing and to reallocate staff to postgrant and voluntary compliance and outreach work. In its FY 1996 budget request, OCR indicates that it will begin 423 such reviews and investigations, more than doubling FY 1994 new starts.[95]

In addition, OCR plans to enhance its compliance reviews, as well as take other proactive steps to eliminate discrimination in certain target areas. According to OCR's Director, during 1995, OCR will conduct compliance reviews of managed care organizations to determine whether their contracting practices with providers produced discriminatory barriers to medical services.[96] OCR also plans to investigate medical redlining practices and to initiate a joint tester program focusing on discrimination based on race or HIV status in the health care industry.[97]

### Complaint Investigations

HHS's enforcement activities are complaint driven. Since 1985, OCR's inventories of complaints has risen from approximately 400 complaints to nearly 1,300 complaints in 1992. Although that number had declined by approximately 200 complaints by 1994, the inventory remains above 1,000 complaints.[98] This volume of complaints requires a large amount of resources, leaving few resources for other aspects of HHS's Title VI enforcement.

Complaint investigations employ the majority of OCR resources. Over the past 10 years, OCR has received more than 1,000 civil rights complaints each year, approximately 300 to 350 of which were Title VI complaints.[99] The number of complaints has steadily increased since 1988. For FY 1988 through FY 1993, OCR received 1,589, 1,642, 1,920, 2,138, 2,299, and 2,094 complaints, respectively. Prior to FY 1988, the average annual receipt level was consistently between 1,100 and 1,200 complaints, indicating that the number of complaints has nearly doubled since the early 1980s. This increase helps to explain the shifting of a disproportionate share of resources to complaint investigations from compliance review and outreach and education activities during late 1980s and early 1990s.[100]

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[93] Ibid., p. 1.

[94] Shalala May 1995 letter, attachment A, p. 4. *See also* HHS Survey, Q. 68, p. 51. The numbers given in the HHS survey response are inconsistent with those reported in its implementation plans. The survey response indicates that HHS completed 76 compliance reviews in 1992, but the FY 1993 Implementation Plan reports that HHS completed 108 such reviews. *See* ibid; HHS FY 1993 Implementation Plan, Workload and Performance Data, p. 22.

[95] Shalala May 1995 letter, attachment A, p. 4.

[96] Hayashi letter, Title VI Plans, p. 4.

[97] Ibid.

[98] *See* Shalala May 1995 letter, attachment B.

[99] HHS Survey, Q. 71, p. 54. *See also* table 6.2. HHS does not maintain data for years before 1981. The numbers reported in the HHS survey are inconsistent with the numbers reported in the HHS Civil Rights Implementation Plans. The HHS survey response does not indicate any particular fluctuation in the number of complaints HHS has received, but its Civil Rights Implementation Plans indicate that the number of complaints received increased by roughly 40 percent between 1989 and 1992, and they report that HHS received more than 2,000 complaints each in fiscal years 1991 and 1992. *See* HHS FY 1993 Implementation Plan, Workload and Performance Data, p. 13; U.S. Department of Health and Human Services, "FY 1992 Civil Rights Implementation Plan," Workload and Performance Data, p. 12 (hereafter cited as HHS FY 1992 Implementation Plan). HHS indicated that the discrepancies arise from the format with which the Commission obtained data. In particular, the format did not provide for nonjurisdiction cases. It also did not capture cases which are coded for the Hill-Burton Act but which also might include Title VI issues. Shalala May 1995 letter, attachment A, p. 5.

According to its Civil Rights Review Team, complaint investigations and preaward reviews use more than three-quarters of OCR's resources.[101] The HHS fiscal year 1993 Civil Rights Implementation Plan indicates that, out of 271 work years devoted to civil rights enforcement in fiscal year 1992, HHS expended 169 work years, or 62 percent, on processing complaints.[102] Even though more than 60 percent of OCR work years are devoted to complaint processing, the inventory of complaints has increased. It more than doubled over a 4-year period. HHS left 585 complaints unresolved at the end of fiscal year 1989, 725 complaints unresolved at the end of fiscal year 1990, more than 1,000 complaints unresolved at the end of fiscal year 1991 or the beginning of fiscal year 1992, and 1,230 complaints unresolved at the end of fiscal year 1992.[103]

In addition, the HHS Civil Rights Review Team indicated that OCR complaint investigations are replete with problems, ranging from an overemphasis on following the same procedures regardless of the nature of the complaint, to inconsistent investigative efforts due to a lack of staff training on investigative procedures, civil rights law, and HHS policy. The growing complaint inventory has created considerable pressure to "close" cases, increasing the likelihood of cases being closed prematurely.[104] Overall, although complaint investigation takes up the majority of its resources, OCR is not keeping up with the inflow of complaints.

OCR has recently taken steps to expedite its case handling by streamlining its complaint processing procedures and by instituting a "high priority case process." OCR is using team approaches, informal resolution processes (alternative dispute resolution techniques), and triage to reduce the amount of time spent on complaints that are not likely to result in a finding of discrimination and to spend "progressively more of our resources on resolving high impact problems of discrimination."[105] Under its Strategic Plan, OCR also is in the process of revising its *Investigative Procedures Manual* to reflect the "best practices" identified at headquarters and regional pilot projects on case management.[106]

### Deficiencies, Remedies, and Sanctions

OCR compliance reviews and complaint investigations often result in findings of noncompliance. However, most cases are resolved through corrective action commitments on the part of recipients, rather than through administrative or legal proceedings.[107]

Of the 21 Title VI compliance reviews completed in 1993, 10 resulted in findings of noncompliance. Each of these involved illegal discrimination,[108] involving instances of "[d]ifferent treatment, unequal services, [and] services in a manner that restricted benefits under the program."[109] Each of the 10 was also resolved through corrective action commitments by recipients.[110] Of the 69 Title VI complaint investigations completed with findings during that year, 6 resulted in cause findings, and 92 involved decisions that were still pending review at the time of the survey response.[111]

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[100] Shalala May 1995 letter, attachment A, p. 4.

[101] *HHS Civil Rights Review Team Report*, p. 21.

[102] HHS FY 1993 Implementation Plan, Workload and Performance Data, pp. 11, 15.

[103] HHS FY 1990 Implementation Plan, Workload and Performance Data, p. 12; HHS FY 1992 Implementation Plan, Workload and Performance Data, p. 12; HHS FY 1993 Implementation Plan, Workload and Performance Data, p. 13.

[104] *HHS Civil Rights Review Team Report*, pp. 6–7.

[105] Hayashi letter, Title VI Plans, pp. 1, 4. *See also* Shalala May 1995 letter, attachment A, p. 5.

[106] Hayashi letter, Title VI Plans, pp. 1, 4. *See also* Shalala May 1995 letter, attachment A, p. 5.

[107] *See* HHS Survey, Q. 68, pp. 51–53; Ibid., Qs. 75, 76, p. 52.

[108] Ibid., Q. 68, pp. 51–3.

According to the HHS survey response, HHS did not refer any Title VI cases to the U.S. Department of Justice in any of the years the Commission specified. HHS also did not independently initiate any administrative proceedings during those years.[112]

OCR plans to seek stronger remedies for civil rights violations. One of OCR's goals is to implement "uniformly strong remedies" to civil rights violations "to make injured parties whole, lessen the chance of future violations, and set a clear precedent for other parties."[113]

### Outreach and Education, Community Liaison, and Technical Assistance

OCR engages in only limited community outreach, public education, and technical assistance activities.[114] There is no indication, in either the HHS survey response, the survey responses of the HHS operating divisions,[115] or in HHS's Civil Rights Implementation Plans, that HHS regularly has made an effort to inform beneficiaries or potential beneficiaries of their rights under Title VI. Furthermore, HHS indicated that some regional offices have not pursued these activities.[116]

Although implementing the fundamental civil rights compliance tools of education and outreach, training, and technical assistance may seem prohibitively costly for an already underfunded civil rights enforcement program, the benefits of these activities may easily outweigh the costs. For instance, by providing increased funding for community outreach and education, HHS could increase the number of valid Title VI complaints, while reducing the number of faulty complaints. More important, by involving the affected communities in the enforcement of their own rights, HHS could simultaneously empower large numbers of people, while improving its own effectiveness.

In recent years, HHS has become more active in providing outreach, education, and technical assistance. It has implemented a requirement for all regional offices to dedicate a portion of their staff time to these tools. In addition to this formal requirement, each regional office participates in these activities when conducting reviews and investigations.[117] Furthermore, during fiscal year 1994, OCR began to solicit input from affected communities on its civil rights enforcement program. It consulted with program beneficiaries, program providers, advocacy organizations, and other "customers" as it began to develop a new

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[109] Ibid., Q. 67, p. 50.

[110] Ibid., Q. 68, p. 51.

[111] Ibid., Q. 74, p. 56.

[112] Ibid., Q. 81(a), p. 53. This answer appears to be inconsistent with an answer to an earlier question on the survey, in which HHS reports having initiated judicial or administrative enforcement based on compliance reviews in six instances in 1992. Ibid., Q. 68, p. 51.

[113] Hayashi letter, p. 2.

[114] *See* HHS Survey, Qs. 46–48, p. 42.

[115] One operating division, the Health Resources and Services Administration, indicated that it disseminated equal employment opportunity and civil rights information with contract awards. *See* U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, completed by the U. S. Department of Health and Human Services, Health Resources and Services Administration, Q. 48, p. 35.

[116] Shalala May 1995 letter, attachment A, p. 6.

[117] Ibid.

Strategic Plan for civil rights enforcement.[118] OCR is apparently committed to continuing its community liaison activities. According to the Director of OCR, OCR plans to hold "informal and formal meetings" with recipient State agencies, State human rights agencies, and advocacy groups to "identify and validate priority issues and to solicit input on OCR's plans and performance."[119] In addition, OCR is proposing to develop, in conjunction with the HHS operating divisions, a training program for State and local agency staff.[120] OCR also plans to conduct a customer service outreach meeting with the HHS operating divisions during fiscal year 1995.[121] HHS's new Strategic Plan makes such community liaison activities a priority.[122]

## Oversight and Monitoring of Continuing State Programs

HHS operates numerous State block grant programs. However, it has not instituted an effective monitoring or oversight system to ensure that States meet their Title VI responsibilities in such programs. Although HHS regulations, like those of other Federal agencies, require States to develop methods of administration specifying their procedures for ensuring compliance with Title VI, OCR has not effected any cooperative agreements or memoranda of understanding with State or local agencies coordinating Title VI enforcement.[123]

Furthermore, HHS has not implemented a systematic process to review States' Title VI compliance activities on a regular basis. OCR's published block grant procedures indicate that OCR has no regular system for reviewing States' Title VI compliance programs, or that it requires States to report their Title VI compliance activities. OCR indicated in its survey response that some State and local agencies investigate Title VI complaints, but that OCR does not evaluate their performance.[124] OCR does investigate complaints against State and local agencies when complaints arise, and it conducts infrequent compliance reviews. However, OCR oversight of States is limited generally to the provision of technical assistance to State officials.[125]

Although HHS has not systematically monitored States' Title VI compliance, it has taken several steps that may effect improved monitoring. OCR plans to develop a civil rights training program for State and local agency staff. It also plans to prepare a "Methods of Compliance" to assist State agencies in their compliance efforts.[126] Furthermore, OCR plans to work with State and local recipients to "plan and initiate pilot projects to secure sub-recipient compliance."[127] OCR's Director did not provide the Commission with supporting documentation of these plans.

## Staff Training

OCR's staff training is extremely limited, consisting of on-the-job training for new staff[128] and annual training seminars on new developments.[129] According to the HHS Civil Rights Review Team, "'OCR employees do not receive adequate training. Some believe that OCR staff are also deficient in the skill needed to do the work.'"[130]

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[118] Hayashi letter, p. 1.

[119] Ibid., Title VI Plans, p. 4.

[120] Hayashi letter, Title VI Plans, p. 5.

[121] Ibid.

[122] *See* HHS/OCR Strategic Plan, p. 4.

[123] HHS Survey, Q. 30, p. 24.

[124] Ibid., Q. 82(d), p. 62.

[125] *See* HHS FY 1990 Implementation Plan, section II.A.8, pp. 8–9.

[126] Hayashi letter, Title VI Plans, pp. 3, 5.

[127] Ibid., p. 3.

[128] HHS Survey, Q. 49, p. 43.

OCR is planning to upgrade its staff training in the future by providing "basic introductory civil rights training" to HHS operating division staff.[131] As a first step, OCR has planned a joint OCR–OGC training that will focus on issue identification, and development of theories, identification of evidence and information, weighing of evidence, and negotiation strategies and techniques. This training, set for May 1995, was scheduled for more than 50 regional and headquarters staff.[132] Although these steps will improve OCR Title VI compliance and enforcement activities, there is no indication that this training would provide specialized instruction on Title VI.

## HHS Reporting Requirements and Data Collection and Analysis

Generally, OCR has limited routine and ongoing data collection and analysis systems.[133] Other than the Community Service Assurance Reporting System, OCR does not regularly or systematically collect data from its recipients.[134] Its regulations require recipients to maintain, and authorizes OCR to collect, such information as necessary to determine compliance.[135] However, OCR only collects such data during investigations and compliance reviews.[136]

Under the Hill-Burton Act,[137] OCR does require recipients of Federal funds for medical facility construction to report patient data to determine whether services are made available on a nondiscriminatory basis. Currently, the Hill-Burton data are collected from 3,500 hospitals, 500 nursing homes, and 1,100 other types of services providers, such as public health centers, medical laboratories, and rehabilitation centers.[138] Hill-Burton Community Service Assurance Reports must be submitted to OCR every 3 years and are used to identify facilities for compliance reviews.[139]

The Hill-Burton Community Service Assurance Report[140] asks for information relevant to assessing a recipient's compliance with Title VI, such as the number of patients and the sources of admission and types of payment by race and ethnicity and information on the accessibility of services to persons with limited English proficiency. The form asks recipients to estimate the proportion of its locality that is comprised of minorities but not to break down this information by race and ethnicity. However, all OCR regional offices are provided with the latest available census data on CD–ROM so that these determinations can be made both in conjunction with the Hill-Burton Survey and with other investigative and review activities.[141] This information is necessary to alert OCR compliance officers to potential Title VI violations, such as barriers to participation affecting some minority communities. In addition, the demographic information about the recipient's staffing assists OCR compliance officers in identifying potential program discrimination resulting from staffing decisions. However, the form does not ask recipients to report on services provided by race or ethnicity and cannot reveal whether members of different racial and ethnic groups are treated disparately. Therefore, the Hill-Burton Community Service Assurance Report should be supplemented with additional data requirements if OCR is to receive enough information for effective Title VI enforcement.

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[129] Ibid., Q. 50, p. 43.

[130] *HHS Civil Rights Review Team Report*, p. 10.

[131] Hayashi letter, Title VI Plans, p. 5.

[132] Shalala May 1995 letter, attachment A, p. 6.

[133] *See* HHS Survey, Qs. 59, 61, 62, pp. 46–47.

[134] Shalala May 1995 letter, attachment A, p. 6.

[135] 45 C.F.R. § 80.6(b) (1994).

[136] HHS Survey, Qs. 59, 61, 62, pp. 46–47. *See also* Shalala May 1995 letter, attachment A, p. 6.

[137] 42 U.S.C. §§ 291 to 291o–1 (1988).

[138] Marcella Haynes, Director, Policy and Special Projects Staff, Office for Civil Rights, U.S. Department of Health and Human Services, letter to Frederick D. Isler, Deputy Assistant Staff Director, Office for Civil Rights Evaluation, U.S. Commission on Civil Rights, Apr. 6, 1994, p. 2 (hereafter cited as Haynes letter).

[139] HHS FY 1990 Implementation Plan, section II.E.4, pp. 16–17; *see* Haynes letter, p. 2.

[140] OMB form no. 0990-0096.

OCR currently is being sued by an African American plaintiff, supported by a coalition of civil rights groups and other organizations, seeking to compel the Office "to collect data and information sufficient to permit effective enforcement of Title VI."[142] The lawsuit notes that HHS does not produce routine reports on the ethnic distribution of beneficiaries by health care provider for the medicare and medicaid programs. It also comments that "since 1981, when a limited survey of hospital compliance occurred, *no* compliance review involving collection of data from Medicare or Medicaid grantees has been conducted by [HHS]."[143] The groups are seeking a change in the hospital and health facility claim form, HCFA–1450, to record the race or ethnicity of the patient receiving care or, alternatively, that HHS demonstrate how it intends to collect the data necessary for evaluating minority access to federally financed health care.[144]

During the last year, OCR has taken several positive steps to upgrade its data collection and analysis function. The Director of OCR reported that OCR has been working to "determine those data systems and data sets that may provide Title VI civil rights compliance targeting information."[145] He also reported that OCR has been working with the Office of the Assistant Secretary for Planning and Evaluation on a project to publish a directory of HHS data systems that incorporate information on race and ethnicity.[146] The Director also indicated that during fiscal year 1994, OCR worked with the Health Care Financing Administration to assess the data collected by the Medicaid Statistical Information System. He stated that, as a result, the Health Care Financing Administration "will be upgrading race and ethnicity data in their data holdings."[147] In addition, OCR's budget request for fiscal year 1996 included a request for funds for a hospital survey.[148]

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[141] Shalala May 1995 letter, attachment A, p. 7.

[142] First amended and supplemental complaint at 18, Madison-Hughes v. Shalala, Civil Action 3:93 0048, p. 18 (M.D. Tenn. June 4, 1993).

[143] *Id.* at 10–11.

[144] *See* Jane Perkins, Sidney Watson, Gordon Bonnyman, memorandum to Individuals and Organizations Interested in Civil Rights and Minority Health, *Amici Curiae* in *Madison-Hughes v. Shalala*, Feb. 9, 1994; Organization of Chinese Americans, newsletter, Winter 1993/Spring 1994, p. 14. *See also* Shalala May 1995 letter, attachment A, p. 7.

[145] Hayashi letter, enclosure, Title VI Plans, p. 5.

[146] Ibid.

[147] Ibid.

[148] Ibid.

## Civil Rights Implementation Plans

The Commission reviewed the HHS Civil Rights Implementation Plans for 1989 to 1993.[149] In general, the plans did not fulfill the purposes for which they were designed by the Department of Justice.[150]

Specifically, the long-range goals and major and short-term objectives set forth in the 1990 plan follow the format provided by the Department of Justice's guidelines for agencies' implementation plans.[151] However, they are not as detailed and do not specify multiyear strategies for achieving long-range goals and major objectives as in the Department of Justice's example.[152] This lack of specificity makes it difficult to determine whether HHS is achieving its Title VI goals and objectives. In addition, the 1990 plan's objectives are essentially identical to the 1989 plan's objectives, even though 1990 was the beginning of a new 4-year civil rights implementation cycle.[153] Objectives in subsequent-year plans also closely resemble those in the 1990 plan.[154]

HHS apparently does not use the Civil Rights Implementation Plans as a management tool, as required by the Department of Justice. Given the lack of specific goals and objectives, time frames for meeting them, and relationship between these goals and objectives and the agency's budget, staff, and workload, the HHS Civil Rights Implementation Plans do not indicate that OCR intended any genuine long-term planning. Beyond a general statement of its expected staff and budget for the year, the 1990 plan contains no information concerning how OCR intends to use its resources to accomplish its goals and objectives. Furthermore, there is no indication that the goals and objectives are based upon expected staff and resources during the budgetary planning cycle at HHS.

The plans also do not provide sufficient information for the Department of Justice to evaluate and the public to understand HHS's Title VI enforcement program. The vagueness and lack of complete information create difficulties in assessing how well OCR is enforcing Title VI. Other than the required statistical data, the plans contain no information that would contribute to such an assessment.

## Planning and Priorities

The HHS Title VI enforcement program has involved no major new initiatives in recent years. As discussed in a recent report by its own Civil Rights Evaluation Team, OCR has been overwhelmed by problems for many years.[155] However, recently, OCR developed a Strategic Plan for civil rights enforcement throughout the Department.[156] OCR developed the plan in consultation with "program beneficiaries, program providers, advocacy organizations, and other customers."[157] The Secretary of Health and Human Services approved the plan on January 20, 1995.[158]

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[149] *See* ibid., pp. 5–6. HHS has not yet submitted a fiscal year 1994 Civil Rights Implementation Plan to the Department of Justice. According to the director of OCR, the Department of Justice granted HHS a delay until its Strategic Plan (discussed below) has been completed and approved.

[150] *See* chapters 3 and 4 for discussions of the Department of Justice's purpose in requiring Civil Rights Implementation Plans.

[151] U.S. Department of Justice, "Guideline for Agency Implementation Plans Required by Executive Order 12250, Leadership and Coordination of Nondiscrimination Laws," 1981.

[152] Ibid, p. 11. The example given by the Department of Justice for a long-range goal is: "To eliminate backlogged civil rights complaints (i.e. carried over 1980 days with now action)." The accompanying major objective gives a time frame: "Close 90 percent of all simple and 50 percent of all complex backlogged cases by the end of fiscal year 1983." The short-term objectives in the example are meant to be carried out over several fiscal years. Ibid.

[153] *See* HHS FY 1989 Implementation Plan, p. 11, attachment A; HHS FY 1990 Implementation Plan, p. 18, attachment A.

[154] *See* HHS FY 1991 Implementation Plan, pp. 16–7, attachment A; HHS FY 1992 Implementation Plan, p. 17, attachment A; HHS FY 1993 Implementation Plan, pp. 18–9, attachment A.

[155] See *HHS Civil Rights Review Team Report*, pp. 1–2.

[156] HHS/OCR Strategic Plan.

In a letter to the Commission, the Director of OCR characterized the plan as:

> - "recogniz[ing] that nondiscrimination protection must be an actual part of issues as disparate as health care reform, welfare reform, long-term care, adoption and child welfare, immigration, jobs, preventive health initiatives, and the location and integration of services;"[159]
> - "anticipat[ing] challenges resulting from accelerating changes in our society;"[160]
> - "address[ing] the Government-wide imperative for change reflected in recommendations of the National Performance Review and in the Secretary's Continuous Improvement Program and the HHS strategic plan."[161]

Key objectives of the plan include: enhancing "partnerships" between OCR and the HHS operating divisions to ensure that civil rights enforcement is integrated into all HHS programs;[162] converting OCR's current reactive, complaint-based enforcement program to a more proactive program;[163] and strengthening communication between OCR and its "customers."[164]

The Strategic Plan is a detailed, comprehensive planning document. It includes an analysis of the challenges facing OCR in achieving its mission, including the country's increasing diversity and the current climate of fiscal retrenchment.[165] It emphasizes the need for civil rights enforcement to "be an integral part of the deliberations on issues as disparate as health care reform, welfare reform, long-term care, adoption and child welfare, immigration, jobs, preventive health initiatives, and the location and integration of services."[166] It also describes the planning process that transpired in developing the Strategic Plan. In particular, it notes that the plan responded to concerns articulated by the internal HHS Civil Rights Review Team, as well as those of HHS customers, operating divisions, and OCR employees.[167]

The plan contains a mission statement for OCR, and discusses its "vision":

> Through excellence in investigations, voluntary dispute resolution, enforcement, technical assistance, policy development and information services, OCR will protect the civil rights of all individuals who are subject to discrimination in health and human services programs. . . .

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[157] Hayashi letter, p. 1.

[158] Omar V. Guerrero, Deputy Director, Office for Civil Rights, U.S. Department of Health and Human Services, letter to Frederick Isler, Acting Assistant Staff Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, Jan. 27, 1995.

[159] Ibid.

[160] Ibid.

[161] Ibid.

[162] *See* HHS/OCR Strategic Plan, pp. 2, 4.

[163] Ibid., p. 7.

[164] Ibid., p. 4.

[165] Ibid., pp. 1–2.

[166] Ibid., p. 2.

[167] Ibid., p. 3.

> OCR, through partnerships with customers and suppliers, will ensure equality in the delivery of services to HHS beneficiaries. . . .[168]

The plan lists eight "action principles," including:

- seeking public input on the highest priority civil rights issues;
- "put[ting] our customers first" by keeping them informed;
- communicating effectively with the public, including persons with limited English proficiency;
- rearranging and reinvigorating the compliance process to make it more efficient;
- developing partnerships with other HHS offices;
- selecting quality employees;
- creating a "learning" organization; and
- empowering employees.[169]

The plan contains three long-range goals:

> 1) Provide leadership in the creation and evaluation of a departmentwide civil rights program;
>
> 2) Increase access to and participation in HHS programs through the prevention or elimination of unlawful discriminatory barriers and practices;
>
> 3) Redevelop the infrastructure of OCR to facilitate execution of the HHS civil rights mission.[170]

Accompanying each of these goals is a list of several more narrow objectives, with both short-term and long-term strategies for achieving them.[171] The short-term strategies are specific and include time frames for their achievement.[172] The second goal identifies discrimination against minorities in access to health and human services and discrimination against persons with limited English proficiency as high priorities in Title VI enforcement.[173]

Overall, OCR's Strategic Plan represents a significant resolution to remedy HHS's civil rights enforcement problems and improve its Title VI implementation and enforcement program. It demonstrates the commencement of an attempt by HHS to fulfill its civil rights enforcement responsibilities. However, HHS approved the plan only recently, and, therefore, OCR will not fully implement it for some time.

In conjunction with its Strategic Plan, OCR is planning other significant steps to organize its operations and to revitalize its civil rights enforcement program. As noted above, HHS is in the process of implementing a "streamlining" plan that will focus its staff resources on its regional offices and reduce levels of management. In addition, OCR is planning several initiatives to develop and refine its guidelines, policies, and procedures. According to OCR's Director, OCR plans to work with the HHS operating divisions to design "civil rights guidelines, indicators of broader access for protected groups, and standards for determining adverse impact."[174] He also indicated that OCR plans to develop guidelines on the provision of interpreter and translation services.[175]

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[168] Ibid., p. 5.

[169] Ibid., p. 4.

[170] Ibid., p. 6.

[171] *See* ibid., pp. 7–20.

[172] Ibid.

[173] Ibid., p. 11.

[174] Hayashi letter, enclosure, Title VI Plans, p. 2.

[175] Ibid., p. 3.

The Director did not provide the Commission with documentation supporting such plans.

## Findings and Recommendations

### Organization, Budget, Staffing, and Workload

#### Organization—Headquarters

**Finding:** Generally, the organizational structure of the U.S. Department of Heath and Human Services' (HHS) external civil rights enforcement program is adequate for Title VI enforcement. The Director of the Office for Civil Rights (OCR), HHS' external civil rights enforcement office, reports directly to the Secretary of HHS. The Director serves in the capacity of Special Assistant to the Secretary for Civil Rights. He has direct (line) authority over all staff conducting Title VI enforcement activities, in both the headquarters and regional offices. This organization enables the director of OCR to influence HHS' policy decisions affecting external civil rights enforcement. It also enables OCR to manage directly, and thereby ensure uniformity, in the execution of HHS' Title VI enforcement procedures. In addition, OCR is not responsible for HHS's internal civil rights responsibilities. This ensures that agency equal opportunity responsibilities do not compromise external equal opportunity responsibilities.[176]

**Recommendation:** Although OCR's practical design facilitates Title VI enforcement in HHS federally assisted programs, it could be improved. First, OCR should acquire legal staff, independent of the Office of the General Counsel, to provide the legal guidance and interpretation and regulatory development requisite to Title VI enforcement. Second, OCR should establish a policy and planning unit to provide overall guidance to the regional and operating staff on Title VI enforcement. Third, staff in the operating divisions with civil rights enforcement responsibilities should be directly managed and guided by and report directly to OCR's Director. HHS should use the Department of Education's Office for Civil Rights as a model. Specifically modeling its organizational structure after DOEd's external civil rights enforcement program and establishing line authority over the operating divisions' external civil rights staff will facilitate HHS' efforts to implement a comprehensive Title VI enforcement program.

#### Organization—Operating Divisions

**Finding:** The operating divisions play a limited role in ensuring HHS funding recipient compliance with Title VI. Although OCR has delegated some Title VI enforcement responsibilities to HHS operating divisions, they conduct few, if any, Title VI enforcement activities.[177] OCR has acknowledged that the regional offices cannot perform sufficient postaward compliance reviews of funding recipients because they are overwhelmed by complaint investigations and preaward reviews. Formally delegating actual enforcement functions to operational staff would relieve the regional offices of some Title VI responsibilities and better enable them to focus on other responsibilities assigned to them that must be conducted by field staff, such as onsite reviews and investigations. Although OCR, through the operating divisions, has a means for conducting postaward compliance reviews, the operating divisions are not meeting their responsibilities.

**Recommendation:** OCR should delegate daily Title VI implementation and enforcement activities to HHS operating divisions in a formal agreement, regulation, or internal order supported by the Secretary. This type of formal delegation will ensure that the operating divisions understand that the delegated Title VI implementation and enforcement responsibilities are not merely accommodations to OCR but duties imposed at the direction of the Secretary. Staff in those divisions should be assigned to conduct desk-audit compliance reviews of funding recipients or other activities more easily and effectively performed by the divisions than through OCR. However, OCR also should institute an oversight mechanism to ensure that the operating divisions fulfill their Title VI responsibilities. It should communicate to the Secretary any findings that an operating division has failed to perform its duties.

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[176] *See* pp. 219–20.

[177] *See* p. 220.

**Finding:** OCR has no line authority over the activities of the operating divisions. Thus, to the extent that staff in the operating divisions perform Title VI enforcement responsibilities, their activities are not overseen or guided by OCR, which is responsible for Title VI enforcement in HHS.[178]

**Recommendation:** OCR remains ultimately responsible for HHS' implementation and enforcement of Title VI. As such, the activities related to Title VI and other external civil rights enforcement that are conducted by the operational level staff must be directly guided by the Director of OCR, like the external civil rights activities of regional staff. To effectuate such guidance, OCR should first develop comprehensive procedures or instructions for the enforcement authority delegated to operating divisions. These procedures should instruct the operational staff to conduct the specific mechanisms assigned them, such as desk-audit compliance reviews. Second, OCR must establish a thorough oversight and monitoring system to review, evaluate, and direct operating divisions' performance related to those compliance functions. As part of this system, operating divisions should be required to report specific activities on a quarter-annually basis; and OCR should regularly review and evaluate operational staff efforts, regularly assist and train operational staff, and provide agency policy guidance and general legal and regulatory guidance as necessary. Such a system will enable OCR to effectuate necessary changes in the operating divisions' responsibilities and practices when problems in Title VI implementation and enforcement are discovered at the operational level.

**Finding:** None of the operating divisions has an independent civil rights staff assigned to external civil rights and, in particular, Title VI compliance. To the extent that they are responsible for Title VI enforcement procedures, several of the operating divisions delegate such responsibilities to their equal employment opportunity office. As such, the amount of time and resources devoted to Title VI enforcement is likely to be overwhelmed by the operating divisions' internal civil rights responsibilities.

**Recommendation:** In order to fully meet their Title VI implementation and enforcement responsibilities, the operating divisions must establish external civil rights units separate from their internal civil rights staff. As at the headquarters or regional levels, when external civil rights responsibilities are combined with internal responsibilities, the internal civil rights responsibilities inevitably are given priority at the expense of the external civil rights function. To effectuate a successful external civil rights unit, OCR should provide operational staff with training specific to external civil rights and, in particular, Title VI implementation and enforcement activities.

**Finding:** None of the operating divisions has an independent civil rights staff for external civil rights compliance. To the extent that they are responsible for Title VI enforcement procedures, several of the operating divisions transfer such responsibilities to their grants management office. As such, a conflict in interest is likely to evolve between the priorities of eradicating discrimination in funding programs and achieving the mission of such programs.[179]

**Recommendation:** The operating divisions must create external civil rights units separate from their grant program administration offices. When the two sets of responsibilities are assigned to grant program staff, a conflict often arises between meeting the particular funding program's objective and achieving civil rights enforcement in that program. In order to develop a competent external civil rights staff, OCR should conduct training specific to external civil rights and, in particular, Title VI implementation and enforcement activities.

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[178] *See* p. 221.

[179] *See* pp. 220–22.

## Budget, Staffing, and Workload

**Finding:** When HHS and DOEd were created out of the former Department of Health, Education, and Welfare, the civil rights staff was divided between the two new departments, with HHS only receiving approximately one-third of that staff. Since that time, both HHS' civil rights staff and budget have decreased.[180] However, as HHS' staff and budget resources for Title VI enforcement decreased, its civil rights responsibilities expanded.[181] Currently, HHS grants approimately eight times more financial assistance than the Department of Education; yet, HHS's civil rights budget is approximately one-half that of DOEd, and its civil rights staff is approximately one-third as large as that of DOEd.[182]

**Recommendation:** In order to utilize its staff efficiently and effectively, OCR should delegate enforcement authority among its regional and operational staff, with headquarters providing regular guidance, oversight, and monitoring of their efforts and activities. Regional staff should concentrate on conducting procedures that must be conducted at field locations, such as onsite compliance reviews, onsite complaint investigations, local community outreach and public education, and onsite assistance to recipients in the relevant locality. Operating division staff should be delegated other daily implementation and enforcement activities, including compliance reviews and investigations that do not have to be conducted locally, such as preaward and postaward desk-audit reviews, data collection and analysis, and reviewing and evaluating recipient self-assessments and assurances of nondiscrimination. Headquarters staff should be responsible for providing policy and legal guidance to, and proactively monitoring and overseeing, the daily implementation and enforcement activities of regional and operational level civil rights staff.

**Finding:** OCR's budget is earmarked in the HHS appropriation, but Title VI enforcement is not. As such, OCR is unable to determine the extent to which resources for Title VI enforcement responsibilities vary relative to those allocated for overall external civil rights enforcement.[183]

**Recommendation:** HHS should establish a system for monitoring and tracking expenditures on each type of civil rights enforcement activity, including complaint investigations, preaward reviews, postaward reviews, staff training, technical assistance, outreach, and education. The system should delineate expenditures on these activities that are specifically associated with Title VI implementation and enforcement. The Commission recognizes that OCR may conduct compliance reviews, complaint investigations, and other activities simultaneously for a variety of civil rights laws, not solely Title VI. However, by using a codification system to approximate the amount of time and resources devoted to each civil rights law applicable, OCR can have a means of justifying budget and staffing requests that will strengthen its Title VI implementation and enforcement program. This system also will enable OCR to ascertain increases or decreases in Title VI resources and to base essential enforcement decisions, such as staffing assignments and assignment priorities, upon such information.

## Regulations, Guidelines, Policies, and Procedures

### Regulations

**Finding:** Because HHS' regulations were not revised when HHS became a separate department in 1980, they are essentially identical to DOEd's. As such, certain sections of the HHS Title VI regulations pertain specifically to DOEd's programs and are irrelevant to HHS activities. In addition, because HHS has not updated its regulations since 1980, they do not reflect the clarification made to Title VI by the Civil Rights Restoration Act of 1987 and do not specifically address HHS' block grant programs.[184]

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[180] *See* p. 218.

[181] *See* p. 223.

[182] *See* p. 218.

[183] *See* pp. 222–23.

**Recommendation:** HHS must issue guidance and clarification specific to the current and practical implementation and enforcement of Title VI. First, it must provide its external civil rights staff and funding recipients' staff with regulatory guidance specific to Title VI enforcement in *each type* of financial assistance programs HHS administers. Second, it must address the clarification made to Title VI by the Civil Rights Restoration Act of 1987, Title VI implementation and enforcement issues particular to HHS' block grant and other State-administered programs, and the extent of funding recipients' authority to implement affirmative measures to fully achieve nondiscrimination in their programs and activities.

### Guidelines

**Finding:** Since its creation as an entity separate from the Department of Education, HHS has not published any Title VI guidelines for its federally assisted programs, as required by the Department of Justice. As such, HHS' Title VI staff and funding recipients lack detailed information on how to conduct Title VI implementation, compliance, and enforcement procedures relative to each of the specific grant programs HHS administers.[185]

**Recommendation:** HHS must promulgate a set of guidelines for Title VI implementation, compliance, and enforcement in each type of federally assisted program it administers. The Department of Justice requires that each set of guidelines (1) explain the exact nature of HHS' Title VI requirements; (2) specify methods for Title VI enforcement; (3) provide examples of practices prohibited by Title VI in the context of each particular type of funding program HHS administers; (4) set forth required or recommended remedial action; and (5) describe "the nature of requirements relating to covered employment, data collection, complaints, and public information." In order for such guidelines to be effective, they should establish methods of administration, or requirements for States assuming Title VI compliance responsibility for HHS' ultimate funding recipients, and ensure that recipients conduct self-assessments of their compliance status and take action to remedy any deficiencies discovered. In addition, such guidelines should include definitive implementation, compliance, and enforcement standards and procedures for the States assuming Title VI responsibility, including, for example, detailed investigative methods and remedial action procedures. The guidelines must also set forth and explain the process for data collection from funding recipients, including instructions and specific examples concerning the type of data and information that must be maintained by recipients and applicants. They also should address requirements for public education and community outreach related to the nondiscrimination mandate of Title VI.

### Policies

**Finding:** Since 1980, when HHS was created, it has only issued 10 policy directives concerning Title VI enforcement. To the extent HHS has developed policy, it has not been effectively communicated to civil rights staff. As a result of HHS' general failure to develop and communicate its policies on Title VI, external civil rights (Title VI) enforcement staff and funding recipients are unfamiliar with HHS' compliance expectations.[186] However, HHS has taken steps to address its deficiencies in the area of policy development. It has assigned a regional civil rights attorney to each of its 10 offices, and under its Strategic Plan, HHS intends to develop standards for programs in assessing discriminatory practices among other goals.

**Recommendation:** HHS must commence regularly developing policies concerning Title VI implementation and enforcement and communicating such policies to its external civil rights staff and funding recipients. Such policies should be aimed at providing civil rights enforcement staff and funding recipients with a complete understanding of the meaning and intent of Title VI compliance relative to the specific programs HHS administers, including statements defining HHS' regulatory intent and elaborating its standards for recipient compliance. In particular, HHS should issue policy directives concerning the following: 1) procedural issues particular to State administered programs, such as HHS' block-grant programs; 2) discriminatory situations particular to HHS' programs, such as equal opportunity for racial and ethnic minorities to participate on health and peer review boards; and 3) discriminatory practices prohibited in specific types of HHS programs, such as discriminatory criteria for achieving research grants. In addition, OCR should regularly develop policy statements on emerging and changing legal issues affecting Title VI compliance, such as changes in case decisions, amendments to statutes, and revisions in regulations or policies affecting Title VI compliance.

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[184] *See* pp. 223–24.

[185] *See* p. 224.

[186] *See* pp. 224–25.

### Procedures

**Finding:** OCR has an *Investigative Procedures Manual*, which contains procedures for conducting complaint investigations, compliance reviews, and preaward reviews related to Title VI, and for generally implementing Title VI in HHS' block grant programs. However, the manual is not sufficiently comprehensive to ensure full integration of Title VI enforcement into every type of HHS grant program. For example, the manual does not include specialized implementation and enforcement procedures particular to HHS' block grant programs.[187]

**Recommendation:** OCR must provide Title VI enforcement staff and funding recipients with step-by-step instructions for implementing Title VI, from the application and preaward process through compliance review and complaint processing, in each type of program HHS sponsors. This is especially important for State-administered programs, such as continuing State programs and block grant programs. Since those programs are actually managed by State and local recipients, rather than by OCR, they involve special and more complicated enforcement issues related to OCR's oversight and monitoring of States' Title VI implementation efforts. It is critical that both OCR staff and State recipients understand how to conduct the Title VI enforcement mechanisms particular to such programs.

## Process of Title VI Enforcement

### Preaward Reviews

**Finding:** HHS lacks a comprehensive preaward review process for all program applicants and recipients receiving HHS funding. Although most of HHS's operating divisions require assurances of nondiscrimination with applications for program funding, the divisions do not perform preaward reviews. OCR's regional and headquarters investigative staff do perform preaward reviews, but only on medicare applicant facilities and providers. As such, HHS disburses an enormous amount of Federal financial assistance without first ensuring that assistance to *all* program applicants and recipients is being allocated in an equitable and nondiscriminatory manner.[188]

**Recommendation:** The Department of Justice requires that every agency determine in writing whether each applicant for Federal financial assistance is in compliance with Title VI prior to granting assistance. Agencies are also required to review data submitted by each applicant—any data and as much information as necessary to determine the applicant's compliance status. Preaward reviews of such applicants are necessarily designed to be more thorough than merely collecting assurance forms. They are designed to determine recipients' Title VI compliance status and to eliminate discriminatory practices before dispensing public funds and before such practices adversely affect potential and actual assistance program beneficiaries. OCR must commence conducting preaward reviews of *all* grant applicants, in addition to securing and evaluating assurances of nondiscrimination. Such reviews should be aimed at identifying discriminatory practices in the delivery of program services based upon evidence, such as unequal participation rates. For example, in HHS research grants, evidence concerning the demographic makeup of the participating or benefiting students as compared to the demographic makeup of the pool of applicants might indicate barriers to participation, such as overt discrimination in selection practices or effectively discriminatory criteria in acceptance policies. Preaward reviews should necessarily involve an examination of documents related to a recipient's administration of a particular Federal program, including, but not limited to: 1) implementation and enforcement policies and information concerning specific compliance activities; 2) statistical evidence concerning program and activity participation rates by racial and ethnic minorities; 3) applications or interview material related to program or participation acceptance or selection; 4) data and information related to the demographic makeup of the program's affected community or pool of potential participants; 5) statistical evidence related to rejection rates; and 6) community outreach and public education materials.

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[187] *See* pp. 225–26.

[188] *See* p. 226–28.

The Commission concurs with the Department of Justice that preaward reviews, both desk-audit and onsite, are essential to an effective Title VI enforcement program and, therefore, OCR should conduct them on all HHS program applicants and recipients. However, the Commission recognizes the budget and staffing limitations of OCR. It realizes that, with continuing emphasis on downsizing and restructuring the Federal Government and maintaining fiscal responsibility, OCR may be unable to acquire additional staff to strengthen fully all aspects of HHS' Title VI implementation, compliance, and enforcement program. The Commission also understands that a lengthy preaward process will delay program benefits and, in effect, adversely impact on ultimate beneficiaries. In light of these factors, the Commission recommends some alternative strategies that will promote a meaningful and efficient preaward process on as many applicants and recipients as possible, eliminating reliance on cursory preaward reviews. These strategies should serve only as a secondary alternative to the optimal preaward compliance review process described above. Although this alternative may not be the most effective at ensuring full enforcement of Title VI, it should allow agencies to have some type of meaningful preaward review mechanism without critically impacting on Title VI enforcement. (See pp. 226–27 of this chapter.)

**Finding:** OCR conducts preaward reviews of medicare applicant facilities and providers. OCR's *Investigative Procedures Manual* instructs civil rights staff on the process for conducting such medicare preaward clearance reviews. That process includes collecting certain demographic data concerning the applicant's service area and staff. However, the manual does not also indicate how OCR staff should utilize the collected data.[189]

**Recommendation:** In addition to setting forth the type of data to be collected from medicare applicant facilities and the process for its collection, the *Investigative Procedures Manual* must instruct staff concerning the purpose for collecting such data from actual and potential providers. For example, the manual should explain that OCR staff should utilize the demographic data submitted by a medicare applicant facility to determine whether participation rates by racial and ethnic minorities are comparable to rates by nonminorities. It should also instruct staff to consider a prospective recipient's staffing patterns for indications of discrimination in its program administration.

### Postaward Desk-Audit Reviews

**Finding:** OCR conducts few postaward desk-audit reviews relative to the number of HHS funding recipients. OCR's failure to conduct such reviews indicates a misappropriation of its resources, because desk-audit reviews can be equally as comprehensive as onsite reviews but can be accomplished more quickly and with fewer resources. Recently, OCR has implemented limited scope reviews that combine the features of desk audits and onsite investigations. This new review method has increased the number of postaward reviews performed. However, a large percentage of HHS funding recipients still do not undergo a postaward review process.[190]

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[189] *See* p. 228.

**Recommendation:** The Department of Justice requires that agencies establish a postaward compliance review process. To meet that requirement, OCR should, given present staffing levels, utilize postaward desk-audit reviews to ensure continuing recipient compliance with Title VI. HHS' postaward desk-audit reviews should be designed to accomplish the following: 1) identify deficiencies in recipients' delivery of program services to potential and actual participants and beneficiaries of all races and ethnicities; 2) investigate allegations of discriminatory barriers to participation in and disparate treatment in participation; 3) evaluate recipients' public education of program accessibility; and 4) identify recipients needing technical assistance or further onsite investigation. The reviews should also be designed to fit each particular type of HHS funding program, including State-administered programs. The results of a postaward review must be in writing and must include specific findings and recommendations for achieving compliance. As with preaward reviews, postaward desk-audit reviews would necessarily be limited to documentary evidence concerning recipients' administration of Federal programs. The same types of documents and material could be examined.

### Onsite Compliance Reviews

**Finding:** OCR has retreated from conducting onsite compliance reviews. In fiscal year 1993, OCR only completed 21 compliance reviews, compared to its average of 99 reviews during the previous 5 years.[191] However, OCR has acknowledged this enforcement deficiency and, in response, plans to improve its compliance review process. For example, during 1995, OCR will conduct compliance reviews of certain health care organizations to determine whether their contracting practices with providers create discriminatory barriers to medical services.[192] Furthermore, through its strategic pilot projects, it is plans to allocate more staff to the postgrant process and begin 423 reviews and investigations in FY 1996.[193]

**Recommendation:** OCR must conduct onsite compliance reviews of all grant recipients' facilities or at least those identified to be in noncompliance by desk-audit reviews. First, the recipient's facility should be thoroughly investigated to identify potentially discriminatory staffing patterns or other potentially discriminatory employment or service practices. Second, staff should interview funding recipient officials, communities affected by the recipient's programs or activities, program participants or beneficiaries, and counselors or interviewers responsible for assisting participants' and program beneficiaries' involvement. Third, compliance policies and practices should be carefully ascertained and examined. Fourth, statistical evidence regarding participation rates should be examined, as well as statistical evidence on application rejection rates. Fifth, applications, or other interview materials, for assistance should be examined to detect possible barriers to participation, such as discriminatory criteria (either intentional or in effect). Sixth, efforts to educate the public and affected community of programs and activities should be evaluated, especially efforts to provide program accessibility information to limited-English-speaking communities or otherwise disadvantaged communities. Each review must be designed to fit the particular type of program at issue. To effectuate a comprehensive compliance review system, civil rights staff must be trained to conduct onsite compliance investigations. If necessary, several of these procedures involving the examination of documentary material could be accomplished by a thorough desk-audit investigation.

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[190] *See* p. 228.

[191] *See* p. 229.

[192] *See* p. 229.

[193] *See* p. 229.

### Complaint Investigations

**Finding:** Complaint investigation employs the majority of OCR resources. However, even though more than 60 percent of OCR work is devoted to complaint processing, the inventory of complaints has risen dramatically, especially with the increased inflow of complaints since 1988.[194] In response, OCR has recently instituted a "high priority" caseload program concentrating resources on cases most likely to result in findings of discrimination. Also, it is using alternative dispute resolution techniques and is in the process of revising its *Investigative Procedures Manual* to reflect the "best practices" at the regional and headquarters on case management.[195]

**Recommendation:** OCR must initiate more extensive methods for eliminating its complaint backlog and efficiently processing and resolving its complaint responses, without sacrificing other, equally important, enforcement procedures, such as preaward and postaward compliance reviews of recipients. First, OCR should establish an early complaint resolution system, by which cases can be resolved before investigation. Second, OCR should increase its reliance on operating divisions for daily compliance responsibilities to alleviate regional staff and better enable them to conduct onsite complaint and compliance investigations. Third, OCR should increase proactive (as opposed to reactive) implementation measures, especially efficient methods, such as thorough preaward desk-audit reviews. The focus on proactive measures should prevent funding from reaching organizations that discriminate; it should enable recipients to receive technical assistance and voluntarily eliminate barriers to equal participation; and it should require recipient self-assessments as part of grant contract obligations. Generally, OCR should focus its efforts on evaluating and influencing the conduct of funding recipients, especially grant applicants, rather than only responding to complaints.

### Deficiencies, Remedies, and Sanctions

**Finding:** OCR compliance reviews and complaint investigations often result in findings of noncompliance. However, most cases are resolved through corrective action commitments on the part of recipients, rather than through administrative or judicial proceedings.[196]

**Recommendation:** OCR must establish a system of monitoring these corrective action commitments. Although such case settlements generally are more efficient than full-fledged legal proceedings, they require monitoring to ensure that remedial action is actually implemented pursuant to the agreement. Such monitoring should be conducted regularly and uniformly for all cases and should involve efforts to ensure compliance until compliance is fully achieved.

### Outreach and Education, Community Liaison, and Technical Assistance

**Finding:** OCR does not regularly conduct community outreach or public education related to Title VI. As such, actual and potential applicants and recipients may lack sufficient knowledge of Title VI's compliance requirements to effectuate full compliance. Similarly, beneficiaries and participants, and the affected community, may lack sufficient knowledge about Title VI's requirements to initiate complaints or otherwise pursue and protect their rights under Title VI.[197] However, OCR has begun soliciting input from affected communities on its civil rights enforcement program. For example, it consulted with assistance program beneficiaries, assistance program providers, advocacy organizations, and other "customers" to develop a new strategic plan for civil rights enforcement.[198] It has required regional offices to provide outreach, education, and technical assistance. Furthermore, OCR is proposing to develop, in conjunction with HHS' operating divisions, a training program for State and local agency staff.

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[194] *See* pp. 229–30.

[195] *See* p. 230.

[196] *See* pp. 230–31.

[197] *See* pp. 231–32.

**Recommendation:** Regarding community outreach, OCR must regularly solicit comments and suggestions from affected communities and funding recipients on its Title VI enforcement efforts. It also should solicit information on affected communities' civil rights concerns, regarding protection of Title VI rights, and funding recipients' compliance concerns, regarding potential Title VI violations and agency compliance expectations. Regarding public education, OCR must actively and regularly inform potential and actual participants, beneficiaries, and affected communities about the extent of their rights and how to pursue and protect their rights, including procedures for filing complaints. OCR also should ensure that recipients educate the public regarding program accessibility. Regarding technical assistance, OCR should regularly train its staff and recipients' staff concerning the methods for achieving enforcement. It should provide step-by-step instruction on conducting procedures, such as compliance reviews. It also should inform staffs within OCR's regional offices, the operating divisions, and in State and local agencies about new and developing civil rights issues, especially changing case law, statutes, regulations, and policies, affecting Title VI enforcement in HHS grant programs.

## Oversight of Continuing State Programs

**Finding:** HHS operates numerous State-administered assistance programs. However, it has not instituted an effective monitoring and oversight system to ensure that States meet their Title VI responsibilities in the programs.[199] OCR does not regularly review States' Title VI compliance policies and activities nor does it require States to report their Title VI compliance performance. OCR's oversight of States apparently is limited to the provision of technical assistance to State officials responsible for Title VI enforcement.[200] However, HHS has attempted to improve its monitoring and oversight of continuing State and block grant programs, including, for example, conducting civil rights training for State and local agency staff.[201]

**Recommendation:** OCR must establish a systematic oversight and monitoring program to evaluate the Title VI compliance policies and activities connected with all programs and activities administered at the State and local levels. First, States must submit methods of administration demonstrating how they intend to ensure recipient compliance with Title VI. That document must include, but should not be limited to, the following: 1) a specific public outreach and education plan for notifying subrecipients of Title VI compliance requirements; 2) a training program for State and local program staff, subrecipients, and beneficiaries regarding HHS' nondiscrimination policies and procedures; 3) procedures for processing complaints, notifying the funding agency, and informing beneficiaries of their rights; 4) a program assessing and reporting periodically on the status of Title VI compliance that involves more than merely a checklist of activities and assurances; and 5) detailed plans for bringing discriminatory programs into compliance. Such assurances are particularly important when the State is responsible for such compliance as preaward reviews, investigating complaints, reviewing and evaluating subrecipients' self-assessments, and conducting compliance reviews. Second, OCR should regularly conduct reviews of the Title VI compliance policies and activities of

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[198] *See* pp. 231–32.

[199] *See* p. 232.

[200] *See* p. 232.

[201] *See* p. 232.

States to evaluate how States are applying their methods of administration. Such reviews should entail a comprehensive evaluation of the States' Title VI enforcement performance. Third, OCR should also systematically monitor and oversee States' data collection and analysis program. Just as Federal funding agencies are required by the Department of Justice to collect and maintain data on their direct recipients, State and local primary recipients must collect and maintain data on their potential and actual subrecipients, beneficiaries, and affected communities. It is the Federal agency's role to monitor this data collection process and ensure that States are maintaining sufficient records. Finally, OCR should also regularly provide technical assistance and other guidance to States to facilitate their Title VI enforcement efforts. Such assistance could involve instruction concerning methods for achieving enforcement (step-by-step instruction on procedures, such as compliance reviews), and new and developing civil rights issues affecting Title VI enforcement, such as changes in statutes, case decisions, regulations, and HHS compliance policies.

## Staff Training

**Finding:** OCR's staff training is extremely limited, consisting only of on-the-job training for new staff and annual training seminars on new civil rights developments. Consequently, OCR staff do not receive adequate professional training.[202] However, OCR has plans to upgrade its staff training. For example, in May 1995, OCR and OGC staff were scheduled for civil rights training, including issue identification, development of theories, identification of evidence and information, weighing of evidence, and negotiation strategies and techniques.[203] Although such plans reflect serious efforts at improving staff training, they overlook the necessity of specialized instruction on Title VI.

**Recommendation:** OCR should regularly conduct training for its staff and recipients' staff on issues of Title VI enforcement and compliance, including, but not limited to, the following areas: instruction on conducting enforcement procedures, such as compliance reviews, complaint investigations, and public education; the nexus between Title VI enforcement and a particular funding program's objectives and administration; the nexus between Title VI and other civil rights enforcement provisions relevant to ensuring nondiscrimination in federally funded activities; Title VI nondiscrimination requirements in particular types of HHS programs; and updates on revisions in HHS' policy, case law, statutes, and regulations affecting Title VI enforcement and compliance.

## Reporting Requirements and Data Collection and Analysis

**Finding:** Generally, OCR has limited routine data collection and analysis systems. It does not regularly collect data from recipients other than for the Community Service Assurance Reporting System. Although its regulations require recipients to maintain, and authorize OCR to collect, such information as necessary to determine recipient compliance with Title VI, OCR only collects such data during compliance reviews and complaint investigations. This is inadequate to ascertain whether recipients are in compliance with Title VI.[204] However, OCR has attempted to improve its data collection and analysis function to ascertain data systems and data sets for collecting and maintaining Title VI civil rights compliance targeting information. OCR also is endeavoring to establish other reporting mechanisms, such as a database directory and a recipient hospital survey.

**Recommendation:** OCR must institute a systematic data and information collection and analysis program to ensure that funding recipients and officials responsible for State-administered programs are fulfilling their Title VI compliance responsibilities. Information should be collected that assists OCR in ascertaining deficiencies in funding recipients' administration of HHS' programs. Such information should include, but should not be limited to: the racial and ethnic makeup of potential and actual participants and beneficiaries, the racial and ethnic makeup of the affected community or pool of potential participants and beneficiaries, and the racial and ethnic makeup of the staff administering the program. Such information should be collected regularly, independently of other enforcement measures, and not only in conjunction with compliance reviews. As part of its data collection and analysis system, OCR should establish a program information database, using the Department of Labor's "SPIR" system as a model. That database should represent an "umbrella" database, under which recipients should then be encouraged to maintain uniform databases. To effectuate this overall data collection and maintenance system, OCR should conduct staff training on all aspects of its function.

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[202] *See* pp. 232–33.

[203] *See* pp. 232–33.

[204] *See* pp. 233–34.

**Finding:** The exception to OCR's limited data collection and analysis efforts is the Hill-Burton Community Service Assurance Report, by which OCR collects data under the Hill-Burton Act. This report requests recipients for information that is relevant to evaluating compliance with Title VI.[205] For example, it requests recipients to estimate the proportion of their program area that is comprised of minorities. Although it does not simultaneously require recipients to provide this information by race and ethnicity, all OCR regional offices are provided with the latest available census data on CD-ROM. This allows OCR to determine whether each minority group is represented among the recipient's patients in proportion to their representation in the relevant locality. However, the report does not ask recipients to report on services provided by race or ethnicity and cannot reveal whether members of different racial and ethnic groups are treated disparately.

**Recommendation:** The Hill Burton Community Assurance Report should be expanded to request information on the breakdown by race and ethnicity of services provided by recipients' programs or activities. All information concerning potential participants and beneficiaries or affected communities should be separated by race and ethnicity to enable OCR to identify potential Title VI violations, such as barriers to program participation by racial or ethnic minority communities. Similarly, demographic information concerning program administration staff should be collected to identify potentially discriminatory effects of program employment decisions. The report should also ask recipients to identify services provided by race or ethnicity, so that OCR can identify disparate delivery of program services among participants or beneficiaries of different races and ethnicities.

**Finding:** HHS currently is being sued by numerous plaintiffs concerning its general failure to collect data sufficient to effect Title VI enforcement. In particular, the lawsuit criticizes HHS' failure to issue regularly information respecting the distribution of medicare and medicaid benefits by health care providers to racial and ethnic minorities. The plaintiffs also challenge a specific health care provider claim form on the basis that it does not record the race or ethnicity of the patient receiving care.

**Recommendation:** OCR generally must commence collecting the demographic data necessary for ascertaining and evaluating racial and ethnic minority communities' access to federally financed health care. It must institute a comprehensive information collection system aimed at ensuring that funding recipients are fulfilling their Title VI compliance obligations. Information should be collected that assists OCR in ascertaining deficiencies in funding recipients' administration of all HHS' programs. That information must include, but should not be limited to: the racial and ethnic makeup of potential and actual participants and beneficiaries, the racial and ethnic makeup of the affected community or pool of potential participants and beneficiaries, and the racial and ethnic makeup of the staff administering the program.

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[205] *See* pp. 233–34.

## Planning and Priorities

**Finding:** In general, HHS' Civil Rights Implementation Plans do not serve as an OCR management tool, as intended by the Department of Justice. In particular, they fail to identify specific goals and objectives and the relationship between available and future staff, resources, and workload and the accomplishment of such goals and objectives. Overall, the plans do not provide sufficient information for the Department of Justice to evaluate HHS' Title VI enforcement program.[206] Recently, OCR developed a Strategic Plan for civil rights enforcement throughout HHS. Key objectives of the plan include: enhancing coordination between OCR and the HHS operating divisions; transforming OCR's reactive, complaint-based enforcement program; and strengthening communication between OCR and its affected communities. The Strategic Plan is a detailed, comprehensive planning document that demonstrates a significant attempt to remedy HHS' Title VI implementation and enforcement problems. However, since HHS only recently approved the plan, OCR will not fully implement it for some time.[207]

**Recommendation:** HHS must develop a comprehensive civil rights enforcement plan that incorporates the qualities of its implementation plan, strategic plan, and work plan. The ideal civil rights enforcement plan should embody: specific short-term goals and long-term objectives, specific time frames or deadlines for their accomplishment, specific short-term and long-term strategies for their accomplishment, consideration of both available and projected resources and budget constraints, application of these priorities and plans to each type of funding program administered, application of these priorities and plans to the particular enforcement mechanism for block grant and continuing State programs, and consideration of the number of expected complaints or other increase in workload. This enforcement plan should be updated every 3 months and should be adjustable to increases and decreases in actual compliance activities and responsibilities and new or developing civil rights enforcement issues, such as agency initiatives and concerns of recipients, participants, beneficiaries, and affected communities.

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[206] See pp. 235–37.

[207] See pp. 235–37.

## Chapter 7

# U.S. Department of Agriculture

The U.S. Department of Agriculture (USDA) administers several hundred federally assisted and federally conducted programs. These programs provide more than $40 billion annually to approximately 50,000 recipients and reach approximately 60 million program participants.[1] Examples of USDA's federally assisted programs are the food stamp program administered by USDA's Food and Nutrition Service, loans and grants afforded to farms and other agricultural entities to promote community and rural development, and funding for soil conservation and agricultural research.[2] USDA's federally assisted programs are administered by at least 14 different USDA agencies,[3] which for the purposes of this report are called "agency heads."

USDA's civil rights enforcement is decentralized. The agency heads are responsible for enforcing Title VI and other relevant civil rights laws for the federally assisted programs they administer.[4] Each of the USDA agencies operates under separate regulations or other governing instructions in addition to USDA's departmentwide Title VI regulations. Each agency also has a civil rights office or component. An umbrella civil rights office, the Office of Civil Rights Enforcement (OCRE) monitors, coordinates, and evaluates the agency heads' civil rights programs.[5]

The Commission received survey responses and other documents from OCRE and 5[6] of the 14 USDA agencies with independent Title VI enforcement responsibilities. This chapter reviews the Title VI enforcement of OCRE and three of the five agencies that responded to the Commission survey: the Food and Nutrition Service, Farmers Home Administration, and Soil Conservation Service.[7] The surveys from these agencies provided a comprehensive overview of Title VI enforcement within USDA. The remaining nine agencies were unable to submit their surveys in time for inclusion in this report.[8]

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[1] U.S. Department of Agriculture, Office of Civil Rights Enforcement (Office of Advocacy and Enterprise), Equal Opportunity Services, *Civil Rights Compliance Review Manual*, Chapter 4—USDA Programs (no date), p. 11 (hereafter cited as USDA/OCRE (OAE), *Civil Rights Compliance Review Manual*).

[2] Office of the Federal Register, National Archives and Records Administration, *The United States Government Manual 1994/1995* (Superintendent of Documents: Washington, D.C., 1994), pp. 111–151.

[3] *See id.* Part 15, Appendix to Subpart A (hereafter cited as USDA, Subpart A). The 14 agency heads included the 1) Agricultural Cooperative Service, 2) Agricultural Marketing Service, 3) Agricultural Research Service, 4) Agricultural Stabilization and Conservation Service, 5) Cooperative State Research Service, 6) Extension Service, 7) Federal Crop Insurance Corporation, 8) Farmers Home Administration, 9) Food and Nutrition Service, 10) Forest Service, 11) Food Safety and Inspection Service, 12) Office of International Cooperation and Development, 13) Soil Conservation Service, and 14) Foreign Agricultural Service. *See id.*

[4] U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Agriculture, Office of Civil Rights Enforcement, Q. 22, p. 17 (hereafter cited as USDA/OCRE Survey).

[5] U.S. Department of Agriculture, Office of the Secretary, *Organization of the Department; Assignments and Reassignments of Functions*, Secretary's Memorandum 1020–39, Sept. 30, 1993, p. 4; William Payne, Acting Deputy Associate Director, Program, Complaints and Adjudication Division, Compliance and Enforcement Staff, Office of Civil Rights Enforcement, U.S. Department of Agriculture, interview in Washington, D.C., Apr. 18, 1994 (hereafter cited as Payne interview).

[6] The five agency heads that responded to the Commission's survey were the Food and Nutrition Service, the Soil Conservation Service, the Farmers Home Administration, the Rural Electrification Administration and the Foreign Agricultural Service.

## USDA Title VI Regulations

USDA has departmentwide Title VI regulations.[9] All USDA agencies, including OCRE, follow the USDA regulations and have developed their instructions and procedures based on the departmental regulations.

USDA's Title VI regulations closely follow the Department of Education (formerly the Department of Health, Education, and Welfare) regulations[10] that were promulgated as a model by the Department of Justice. They contain the same list of prohibited forms of discrimination,[11] and the same language on employment discrimination,[12] disparate impact,[13] and affirmative action.[14] Thus, in these critical areas, USDA's Title VI regulations meet the necessary requirements to serve as an adequate basis for the Department's Title VI enforcement program.[15]

In addition, USDA has made important modifications to the model Title VI regulations to fit USDA's federally assisted programs. USDA added extensive examples of how the regulations apply to USDA programs.[16] The examples help to clarify the practical application of Title VI's discrimination prohibition to programs funded by USDA. For example, the USDA Title VI regulations give as an example of prohibited discrimination any practice that would exclude a member or stockholder of a cooperative or corporation from participating in any meeting or that would be discriminatory with respect to the exercise of their rights.[17] To the extent that much USDA funding is distributed through cooperatives and corporations, it is important that individuals not be excluded, on the basis of race, color, or national origin, from decisionmaking positions in these entities. If members of a protected group are prevented from serving in such positions, the decisions made by the cooperatives and corporations may adversely affect intended beneficiaries from the same protected group. Full participation by all groups is conducive to ensuring that policies and services adopted by the cooperatives and corporations are fair and nondiscriminatory. USDA added examples to the regulations related to its own programs. In one example, USDA incorporated the same language used in the model regulations because USDA and the Department of Education have recipient elementary and secondary schools in common. Thus, for certain programs, it is appropriate for USDA to use the Department of Education's examples.[18]

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[7] The chapter does not review the Rural Electrification Administration or the Foreign Agricultural Service, although the two agencies submitted surveys and other documents.

[8] The nine agencies that did not respond were given a 2-month extension to submit the Commission's survey. These agencies are the Agriculture Cooperative Service, the Agricultural Marketing Service, the Agricultural Research Service, Agricultural Stabilization and Conservation, the Cooperative State Research Service, the Extension Service, the Federal Crop Insurance Corporation, the Forest Service, and the Food Safety and Inspection Service.

[9] 7 C.F.R. Part 15 (1994). USDA/OCRE Survey, Q. 3, p. 5. The U.S. Department of Justice approved the regulations in 1975. USDA/OCRE Survey, Q. 2, p. 5.

[10] 34 C.F.R. Part 100 (1993).

[11] 7 C.F.R. § 15.3(a)-(b) (1994). *See* 34 C.F.R. § 100.3(a)-(b) (1993).

[12] 7 C.F.R. § 15.3(c) (1994). *See* 34 C.F.R. § 100.3(c) (1993).

[13] 7 C.F.R. § 15.3(b) (2),(3) (1994). *See* 34 C.F.R. § 100.3(b) (2),(3) (1993).

[14] 7 C.F.R. § 15.3(b) (6) (1994). *See* 34 C.F.R. § 100.3(b) (6) (1993).

[15] *See* chapter 4 for a discussion of why Title VI regulations must address these areas adequately.

[16] 7 C.F.R. § 15.3(d) (1994).

[17] *Id.* § 15.3(d) (2) (v).

USDA's Title VI regulations include a detailed Appendix A, which identifies USDA's federally assisted programs and activities separately for each agency head and specifies the statute that gives the agency the authority to administer such programs.[19] However, although the U.S. Department of Justice's coordination regulations require agencies to maintain their Appendix A up to date,[20] USDA has not revised and updated the appendix since December 1, 1988.[21] Thus, the appendix may omit USDA programs that were instituted after that date. As a result, USDA does not have a definitive, publicly accessible source of information to describe the USDA programs covered by Title VI as required by the Department of Justice's coordination regulations.

With the exception of a change with respect to filing complaints,[22] the USDA regulations have not been revised since 1973.[23]In particular, they have not been updated to reflect the Civil Rights Restoration Act of 1987,[24] which clarified the coverage provision of Title VI by defining expressly the term "programs and activities."[25] Furthermore, USDA has not issued policy guidance explaining the significance of the Civil Rights Restoration Act for the enforcement of Title VI in USDA programs.

The USDA Title VI regulations specifically delegate to the USDA agency heads the responsibility to seek cooperation from recipients in obtaining compliance. They require each recipient to keep and submit to the respective agency head timely, complete, and accurate compliance reports.[26] Except for standard language, identical to that in the model regulations, on the procedures for enforcing Title VI, the USDA regulations leave to the discretion of OCRE and the agency heads procedural decisions on how to implement the law.[27] Each agency head and OCRE has its own instructions and procedures for implementing Title VI and other civil rights activities.

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[18] *See, e.g., id.* § 15.4(e).

[19] *Id.* § 15, Subpart A, App. A.

[20] 28 C.F.R. § 42.403(d) (1993).

[21] U.S. Department of Agriculture, Office of Civil Rights Enforcement, "Fiscal Year 1991 Civil Rights Implementation Plan," p. 3 (hereafter cited as USDA/OCRE FY 1991 Implementation Plan).

[22] 7 C.F.R. § 15.6 (1994) was updated in 1985.

[23] *See* 7 C.F.R. Part 15 (1994). OCRE's Policy and Planning Division is currently revising several regulations including 7 C.F.R. 2.80, Delegations of Authority; 7 C.F.R. Part 15, Subpart A, Non-Discrimination in Federally-Assisted Programs of the Department of Agriculture—Effectuation of the Civil Rights Act of 1964; and 7 C.F.R. Part 15b, Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving Federal Financial Assistance. *See* Dan Glickman, Secretary, U.S. Department of Agriculture, letter to Mary Frances Berry, Chairperson, U.S. Commission on Civil Rights, May 24, 1995, attachment, p. 1 (hereafter cited as Glickman letter).

[24] Pub. L. No. 101–259, 102 Stat. 28 (codified as amended in scattered sections of U.S.C.).

[25] *See* chapter 2 for a discussion of the implications of the Civil Rights Restoration Act for Title VI, pp. 36–40.

[26] *Id.* § 15.5(b).

## Office of Civil Rights Enforcement

### Organization and Responsibilities

#### Current Organization and Responsibilities of OCRE

OCRE is the "umbrella" civil rights office at USDA. OCRE has responsibility for the development, implementation, and coordination of all aspects of USDA's civil rights program. OCRE provides guidance and technical assistance to agency heads in carrying out their civil rights responsibilities.[28] OCRE is responsible both for enforcing Federal civil rights laws prohibiting discrimination in federally assisted and conducted programs[29] and for internal equal employment opportunity programs within the Department.[30] In addition, in 1993, OCRE received enforcement responsibilities for Title II of the Americans with Disabilities Act of 1990,[31] including investigating all complaints filed under the law.[32]

With respect to external civil rights enforcement, OCRE monitors, coordinates, and evaluates agency heads' efforts to enforce Title VI and other related laws and regulations by conducting audits, onsite field reviews, or compliance reviews to determine the degree of compliance and enforcement.[33] Although the USDA agency heads conduct preliminary investigations on civil rights complaints relating to their programs, OCRE

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[27] 7 C.F.R. § 15.8(b) (1994). If an applicant refuses to furnish an assurance or refuses to comply with the requirements of Title VI, the Department is not required to provide assistance during the pendency of any proceedings, except where the assistance is due and payable to an applicant because the assistance was approved prior to the effective date of the regulations (January 1993).
*See also id*. § 15.8(d). No action to effect compliance by any other means can be taken until the Secretary has determined that compliance cannot be secured by voluntary means, the recipient has been notified of its failure to comply and of the action to be taken, and the expiration of at least ten days from the mailing of such notice to the recipient.
*See also id*. § 15.1. There is the opportunity for a hearing which is held by a hearing officer. The hearing officer is a hearing examiner appointed and designated to hold hearings and make an initial decision concerning the outcome, unless reviewed by the Secretary.
*See also id*. § 15.8(c). No order suspending, terminating, or refusing financial assistance can become effective until (1) the Agency has advised the applicant or recipient of the failure to comply and that compliance can not be secured by voluntary means, (2) there has been an express finding on the record, after the opportunity of a hearing, of a failure by the applicant or recipient to comply with the law, and (3) the action has been approved by the Secretary within 30 days after the Secretary has filed with the appropriate committee of the House and Senate, a written report of the circumstances and the grounds for such action. Any action to suspend or terminate funds must apply to whom such a finding is made and is limited to only that part of the program found not to be in compliance.

[28] USDA/OCRE Survey, Q., 25, p. 18. The USDA agency heads administer contracts, grants and loans for federally assisted programs. They also review agency and grant processes for compliance with Title VI. USDA agency heads also conduct Title VI compliance reviews, including preaward and postaward (desk-audit) reviews. Ibid.

[29] Ibid., Q. 22, p. 17. Coverage includes Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d - 2000d–7 (1988); section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988 & Supp. V 1993); Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (1988); the Age Discrimination Act of 1975, 42 U.S.C. §§ 6101–6107 (1988); the Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601–3619, 3631 (1988 & Supp. V 1993); and the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f (1988 & Supp. V 1993). Ibid.

[30] USDA/OCRE FY 1991 Implementation Plan, p. 4.

[31] 42 U.S.C. §§ 12,131–12,134 (Supp. V 1993).

[32] U.S. Department of Agriculture, Office of Civil Rights Enforcement, "Fiscal Year 1994 Civil Rights Implementation Plan," pp. 1,3 (hereafter cited as USDA/OCRE FY 1994 Implementation Plan).

[33] USDA/OCRE (OAE), *Civil Rights Compliance Review Manual*, p. 1.

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conducts final investigations and issues determinations of violation or compliance.[34]

The Director of OCRE reports to the Assistant Secretary for Administration.[35] Thus, the Director is several layers removed from the Secretary of USDA, a placement which suggests that civil rights enforcement is not a high priority at USDA.

Since the recent consolidation of the EEO counseling functions, which was approved in September 1994, OCRE is organized into two major program areas, each reporting to a Deputy Director. The program areas are: Evaluation and Adjudication (E&A), which administers USDA's formal EEO and civil rights complaint processing; and Disputes Resolution, Policy and Planning (DRPP), which manages USDA's EEO counseling program, policy, and planning.[36]

The E&A is divided into three components:

- Employment Complaints Adjudication Division, which oversees USDA's processing of employment discrimination complaints;

- Program Complaints Adjudication, which oversees USDA's processing of discrimination complaints with respect to federally assisted and federally conducted programs; and

- Evaluation and Investigation Division, which establishes compliance standards, monitors and evaluates the external civil rights compliance programs of USDA, and conducts all desk audits, onsite field reviews, and complaint investigations.[37]

The DRPP has two components:

- Disputes Resolution, which manages USDA's EEO counseling and mediation program. Six field offices are being established in Atlanta, New Orleans, San Francisco, Denver, Kansas City, and Washington, D.C.
- Policy and Planning Division, which is responsible for policy and planning for both internal and external civil rights enforcement activities, as well as for developing civil rights training programs and materials for staff and providing technical assistance to USDA agencies, program recipients, and the public.[38]

The reorganization reflects a decision by USDA "to reorganize and consolidate Civil Rights and Equal Employment Opportunity (EEO) Programs into one Agency that would be responsible for ensuring compliance and enforcement with civil rights laws and regulations."[39] This decision was motivated primarily by the Department's perception that USDA's EEO program was ineffective, to the point that many regarded the Department as the "last plantation."[40] The reorganization also transferred several units previously in the civil rights office, but not specifically related to civil rights and EEO enforcement, to other locations within USDA.[41]

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[34] USDA/OCRE Survey, Q 25(i),(k), p. 19.

[35] Ibid., Q. 20, p. 16.

[36] Glickman letter, attachment, p. 1.

[37] Ibid., p. 2.

[38] Ibid.

[39] Robert Franco, Associate Director, Compliance and Enforcement Staff, Office of Civil Rights Enforcement, U.S. Department of Agriculture, letter to Frederick D. Isler, Deputy Assistant Staff Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, Apr. 20, 1994 (hereafter cited as Franco letter), attachment, "Narrative Statement of Proposed Changes," p. 2.

[40] Farook Sait, Associate Director, Office of Civil Rights Enforcement, U.S. Department of Agriculture, interview in Washington, D.C., June 17, 1994, p. 1 (hereafter cited as Sait interview).

[41] Franco letter, "Narrative Statement of Proposed Changes," p. 2.

The reorganization changed the name of the civil rights office from the Office of Advocacy and Enterprise to the Office of Civil Rights Enforcement. According to staff members in OCRE, the purpose of the name change was to allow easier identification of the function, authority, and responsibility of the office.[42]

Under the reorganization, OCRE has assumed internal civil rights responsibilities, such as the processing of Title VII/equal employment opportunity (EEO) complaints. As a result, a danger arises that USDA's Title VI enforcement may suffer at the expense of Title VII enforcement. The Commission's survey of other Federal agencies indicates that when the same office performs internal EEO and external civil rights functions, internal EEO priorities and activities tend to receive the majority of the resources at the expense of the external civil rights programs, especially Title VI.[43] The Department of Justice (DOJ) strongly confirmed this assessment.[44]

### Past Reorganizations

The most recent reorganization of USDA's civil rights office is only one of a number of reorganizations and name changes the office has undergone since its creation in 1971, when it was called the Office of Equal Opportunity. From its beginnings, the mission of USDA's civil rights office was to formulate policy and oversee and monitor civil rights activities throughout USDA.[45] The Department's civil rights program has always been decentralized; however, the Department's office of civil rights has been the civil rights "voice" at USDA.[46]

Around 1980 or 1981, there was an agenda to "dismantle" the office. Compliance reviews and investigations were stopped, and "unspent" funds were returned as "waste."[47] Because the Director at that time regarded the office as having a primarily minority constituency, the Office of Equal Opportunity was renamed the Office of Minority Affairs. Between 1981 and 1986, the office had a "revolving door" of civil rights directors, many of whom had no civil rights experience. A reorganization during this period changed the name of the office back to the Office of Equal Opportunity. Until 1986 compliance review reports were systematically suppressed and reports with negative findings were generally not released. Managers and supervisors were downgraded, and the overall morale of the staff was low.[48] Civil rights enforcement at USDA "diminished," and the civil rights office became a "rubber stamp" in enforcement.[49] Whereas prior to 1981, 30 to 35 staff had been assigned to Title VI activities, by 1986, 12 staff were responsible for all of the office's civil rights enforcement. Even today, the office is still suffering from the impact of these actions.[50]

In the 1990s, OCRE continued to undergo reorganizations. The changes have ranged from shifts in staff assignments and civil rights responsibilities, to name changes. For example, in October 1990, the Special Emphasis Outreach Program in the Office of Advocacy and Enterprise was given responsibility for section 504 enforcement,[51] which had previously been under the Equal Opportunity (enforcement) section.[52] OCRE's 1992 Civil Rights Implementation Plan indicated that OCRE planned a reorganization of equal opportunity staff in the Office of Advocacy and Enterprise.[53] The 1993 implementation plan indicated that Equal Opportunity had been renamed Equal Opportunity Services and that the Compliance, Complaints and Adjudication Division was reorganized as the Complaints and Adjudication Division. The compliance function was placed in the Employment and Program and Compliance Division.[54]

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[42] Franco letter.

[43] *See* U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Transportation, the U.S. Department of Veterans Affairs, the U.S. Department of Labor, and the Environmental Protection Agency.

[44] *See* James P. Turner, Acting Assistant Attorney General, U.S. Department of Justice, memorandum to Antonio Califa, Director, Departmental Office of Civil Rights, U.S. Department of Transportation, Feb. 2, 1994.

[45] Sait interview, p. 1.

[46] Ibid.

[47] Ibid.

[48] Ibid., p. 2.

[49] Ibid.

[50] Ibid. According to Mr. Sait, the impact of the reorganizations of the 1980s on the civil rights offices at the various agency heads depended on whether or not the administrator or chief was a political appointee. Although most of the civil rights offices in the agency heads have not been headed by a political appointee, OCRE is headed by a political appointee. Ibid.

The impact of the numerous reorganizations on Title VI or other civil rights enforcement at USDA remains unclear.

### USDA Reorganization

In October 1994, based on the Department of Agriculture Reorganization Act of 1994, Secretary Espy approved a USDA-wide reorganization that was designed to restructure USDA along mission area lines to create a streamlined and revitalized department. Under the reorganization, the number of separate USDA agency heads was reduced from 43 to 29. The agencies report to nine Under and Assistant Secretaries. Within each of the mission areas, management support services such as civil rights have been consolidated to achieve more efficient operations and savings.[55]

Each mission area will designate a lead agency to consolidate administrative functions, including civil rights. The Civil Rights Director for the lead agency will have coordinating responsibility for civil rights, including Title VI programs, in the respective mission area. Civil Rights Directors in other agencies within the mission area will have liaison responsibility for the program. As a result, in addition to OCRE, USDA will have nine major civil rights components.[56]

## Budget, Staffing, and Workload

The USDA budget does not include an earmark for civil rights/EEO activities.[57] USDA provides Congress with a budget request for departmental administration explaining which portion will be allocated to OCRE. Congress then provides appropriation to departmental administration, but no specific amount is designated for OCRE. Nor is there an amount earmarked for Title VI implementation.[58] According to the Director of OCRE, this is because external civil rights enforcement is primarily the function of the program agencies, with OCRE maintaining only an oversight role.[59] However, the absence of specific funding for Title VI allows resources to be transferred from one civil rights enforcement activity to another without adequate management planning by OCRE. Thus, if another civil rights responsibility becomes pressing, OCRE may divert resources away from Title VI enforcement without ever making a formal decision to do so. Similarly, USDA agencies do not have specific earmarks for civil rights/EEO activities. Funding for these activities is allocated from within salaries and expenses budgets.[60]

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[51] U.S. Department of Agriculture, Office of Civil Rights Enforcement, "Fiscal Year 1993 Civil Rights Implementation Plan," p. 4 (hereafter cited as USDA/OCRE FY 1993 Implementation Plan).

[52] USDA/OCRE FY 1991 Implementation Plan, p. 1.

[53] U.S. Department of Agriculture, Office of Civil Rights Enforcement, "Fiscal Year 1992 Civil Rights Implementation Plan," p. 3 (hereafter cited as USDA/OCRE FY 1992 Implementation Plan). The reorganization had two features: 1) an increase in staff to 13 FTEs for processing and adjudicating program complaints; and 2) a coordination staff of 15 FTEs to work in both equal employment opportunity and program areas, including training. An additional four FTEs were to be assigned to the Associate Director's office. Ibid.

[54] USDA/OCRE FY 1993 Implementation Plan, p. 1.

[55] Glickman letter, attachment, p. 2.

[56] Ibid.

[57] Glickman letter, attachment, p. 3.

[58] Ibid.

OCRE's budget increased from $3.1 million in fiscal year 1990, to $4.2 million in fiscal year 1993.[61] Over the same time period the number of FTEs in OCRE increased from 58 to 65.[62] Under the September 1994 reorganization, OCRE received 102 new positions to carry out its new responsibilities in the area of equal employment opportunity.[63] In fiscal year 1994, OCRE's budget increased from $4.2 to $4.3 million, and in 1995, the budget increased to $8.3 million.[64] This increase was a result of the September 1994 consolidation and centralization of the internal EEO counseling function in OCRE.[65]

However, the number of staff devoted to external civil rights enforcement has declined considerably since the 1980s. In 1982, 63 FTEs carried out the functions of the compliance staff and the special emphasis program managers. As of December 1993, approximately 20 FTEs performed these duties.[66] Under the current reorganization, USDA plans to increase OCRE's Compliance and Enforcement Division staff, most of whom perform external civil rights enforcement activities, to 56 FTEs.[67] Of these, 21 will be in Program Complaints and Adjudication; 22 in Evaluation and Investigation; and 9 in Policy and Planning, with the remainder in the Associate Director's Office.[68] However, the 56 FTEs that USDA plans to devote to external civil rights compliance fall short of the 1982 level of 63 FTEs.

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[59] David Montoya, Director, Office of Civil Rights Enforcement, U.S. Department of Agriculture, letter to Frederick D. Isler, Acting Assistant Staff Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, July 5, 1994 (hereafter cited as Montoya July 1994 letter), attachment, Q. 4.

[60] Glickman letter, attachment, p. 3.

[61] USDA/OCRE FY 1991 Implementation Plan, p. 6; USDA/OCRE FY 1992 Implementation Plan, p. 3; USDA/OCRE FY 1993 Implementation Plan, p. 3. In fiscal year 1992, OCRE (the Office of Advocacy and and Enterprise) received $3.8 million, and in fiscal year 1993, it received $4.2 million. USDA/OCRE FY 1993 Implementation Plan, p. 3. USDA did not provide the final budget appropriation for fiscal year 1994 to the Commission because of the then-pending USDA reorganization.

[62] U.S. Department of Agriculture, Office of Civil Rights Enforcement, "Fiscal Year 1994 Civil Rights Implementation Plan," p. 3 (hereafter cited as USDA/OCRE FY 1994 Implementation Plan); U.S. Department of Agriculture, *Organization of the Department Assignments and Reassignments of Functions*, Secretary's Memorandum 1020–39 (Sept. 30, 1993); Kelwin Merida, "Agriculture Reclamation Embrace Major Reorganization," *The Washington Post*, Apr. 14, 1994, p. A29.

[63] David Montoya, Director, Office of Civil Rights Enforcement, U.S. Department of Agriculture, letter to Frederick D. Isller, Acting Assistant Staff Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, Dec. 23, 1994 (hereafter cited as Montoya December 1994 letter), p. 1.

[64] Glickman letter, attachment, p. 3.

[65] Ibid.

[66] USDA/OCRE Survey, Q. 26, p. 20.

[67] Montoya July 1994 letter, attachment, Q. 7.

[68] Ibid., Qs. 1–3.

OCRE reported that its workload had risen due to an increase in the number of section 504 complaints, but indicated that the increased workload had little or no impact on the Office's capacity to enforce Title VI during the last 5 years.[69]

## Regulations, Policies, Procedures, and Guidelines

### Regulations

In addition to USDA's Title VI regulations discussed above, OCRE enforces Departmental Regulation 4330–1, which establishes procedures and provides guidance to USDA agencies on compliance reviews.[70] Departmental Regulation 4330–1 requires agencies to have a compliance review system[71] and specifies the relative responsibilities of OCRE and the USDA agency heads.[72] It requires agencies to conduct preaward and postaward reviews of applicants/recipients to determine compliance with civil rights laws and regulations and also allows for assessment reviews and special field reviews.[73] The regulation lays out procedures for conducting compliance reviews.[74] The regulation gives the agency heads the responsibility of preparing an annual Civil Rights Implementation Plan.[75]

The regulation specifies, in an appendix, what agencies should consider in determining an applicant/recipient's compliance status with respect to civil rights laws.[76] The appendix requires agencies to ensure that their recipients or their program offices implement an effective public notification program to inform program beneficiaries of their rights and responsibilities, the policy of nondiscrimination, and procedures for filing a complaint. The public notification program should include bilingual services and services for the visually or hearing impaired as appropriate.[77] The appendix also requires agencies to have a system for collecting and reporting program participation data by race, ethnicity, and sex; that they ensure that all recipients and subrecipients submit assurances of nondiscrimination; and that they provide civil rights training to their staff.[78]

Departmental Regulation 4330–1 is detailed and comprehensive. As such, it constitutes a strong foundation for USDA's Title VI implementation and enforcement program. However, in places, the regulation is unclear. For instance, the regulation discusses, at great length, different types of program compliance reviews (required reviews by agencies, assessment reviews by agencies and OCR, and special field reviews), but the differences between these reviews are not apparent to an observer who is not extremely familiar with USDA's Title VI compliance program. Furthermore, the discussion of compliance reviews does not clearly distinguish between reviews of the agency heads' compliance programs by OCRE as part of its oversight and coordination role, and compliance reviews of USDA recipients by either OCRE or the agencies.[79]

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[69] USDA/OCRE Survey, Q. 28, p. 20.

[70] U.S. Department of Agriculture, Office of Advocacy and Enterprise, Departmental Regulation 4330–1, "Departmental Policy for Program Compliance Reviews," June 27, 1986 (hereafter cited as USDA Departmental Regulation 4330–1). USDA has two other major instruments implementing guidelines for Title VI compliance: U.S. Department of Agriculture, Office of Civil Rights Enforcement, Departmental Regulation 4300–4, "Civil Rights Impact Analysis," Sept. 22, 1993; U.S. Department of Agriculture, Office of Civil Rights Enforcement, Departmental Regulation 4300–3, "Equal Opportunity Public Notification Policy," Apr. 21, 1986. *See* Glickman letter, attachment, p. 3.

[71] USDA Departmental Regulation 4330–1, p. 2.

[72] Ibid., pp. 3–4.

[73] Ibid., pp. 4–7.

[74] Ibid., pp. 8–9.

[75] Ibid., p. 10.

[76] Ibid., app. A.

[77] Ibid.

[78] Ibid.

In addition to Departmental Regulation 4330–1, in September 1993, OCRE issued Departmental Regulation 4300–4, which requires USDA agencies to identify and address the civil rights implications of proposed agency actions before the agencies implement them.[80] The regulation defines major civil rights impacts as follows:

> Major civil rights impacts are those consequences of proposed policy actions which, if implemented, will negatively and disproportionately affect minorities, women, or persons with disabilities who are employees, program beneficiaries or applicants for employment or program benefits in USDA-conducted or assisted programs by virtue of their race, color, sex, national origin, religion, age, disability, or marital or familial status.[81]

The regulation also provides several examples of actions that have a negative civil rights impact on protected communities.[82] This regulation should be a useful mechanism for ensuring that civil rights is integrated fully into USDA agency programs as they are implemented.

### Guidelines, Policies, and Procedures

One of the most important roles for an umbrella civil rights office in Federal agencies with decentralized civil rights enforcement is policy development and the issuance of guidelines to ensure consistent civil rights enforcement throughout the agency. However, although OCRE provided internal procedural regulations, it did not provide any policy statements and has not issued Title VI guidelines for USDA programs.[83] For example, OCRE has not issued policy guidance on the implications of the Civil Rights Restoration Act for its Title VI enforcement program.

OCRE does have a detailed compliance review manual.[84] The manual provides detailed procedures for OCRE compliance reviews of USDA agency heads' civil rights compliance programs. The manual clearly lays out the responsibilities of the agency heads. It also provides guidance to OCRE staff on how to conduct reviews and interviews, and what kind of information to collect and report in the review report.[85] However, the OCRE manual does not detail specific time frames for completing tasks nor does it address the legal standards for discrimination under Title VI. Furthermore, the manual suffers from the same lack of clarity as Departmental Regulation 4330–1, particularly in its discussion of different kinds of compliance reviews.[86]

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[79] Ibid., pp. 4–7. USDA is revising Regulation 4330–1 to expand and establish minimum standards for implementing program responsibilities in a more effective and efficient manner. The regulation includes requirements for compliance and evaluation of federally assisted and federally conducted programs and services, and organizational and individual accountability of program performance. USDA is placing greater emphasis on creating a positive system of feedback, accountability, and program effectiveness by promoting a new focus on results and customer service.

[80] U.S. Department of Agriculture, Office of Civil Rights Enforcement, Departmental Regulation 4300–4, "Civil Rights Impact Analysis," Sept. 22, 1993.

[81] Ibid., p. 2.

[82] Ibid.

[83] Publishing such guidelines is an agency-head responsibility. USDA/OCRE (OAE), *Civil Rights Compliance Review Manual*, p. 29.

[84] *See* ibid.

[85] Ibid., pp. 12–26.

[86] Ibid., pp. 13–14.

## OCRE Oversight, Coordination, and Monitoring of Agency Heads' Title VI Enforcement

OCRE has the responsibility for oversight, coordination, and monitoring of the USDA agency heads' Title VI enforcement programs.[87] As part of these responsibilities, OCRE is required to review USDA agencies to ensure that they are fulfilling their civil rights responsibilities. OCRE is supposed to make regular, systematic inspections and evaluations of agency heads civil rights programs. These evaluations, which USDA calls "compliance reviews," are monitoring tools to assess the activities and to review the effectiveness of the agency heads in enforcing civil rights laws. The evaluations focus on the major civil rights categories of assurances, public notification, data collection and reporting, compliance reviews, complaints of discrimination, and civil rights training.[88] OCRE may review a single agency, or it may conduct with agency head's assistance a multiagency review of many of the agency head programs in a larger geographical area. Field reviews require coordination with OCRE, regional, State, and local program officials.[89] In addition to field assessment reviews, agency heads and OCRE are responsible for desk-assessment reviews of civil rights activity at all levels of agency operations. These desk-audit reviews may be systematically scheduled or chosen at random. Agency heads are to respond to OCRE's request for particular reviews and OCRE is to report its findings to the agency heads.[90]

OCRE's predecessor, the Office of Advocacy and Enterprise, had desk officers assigned to each USDA agency head to conduct ongoing assessments of the agencies' civil rights implementation and enforcement programs. The desk officers were required on an ongoing basis to review all agency head civil rights regulations, directives, and guidelines; perform desk-audit assessments as appropriate; monitor the adequacy and timeliness of corrective actions during compliance reviews and findings of noncompliance; and evaluate all USDA Civil Rights Implementation Plans.[91] However, the desk officer positions have been abolished, because low staffing levels did not allow specialists to concentrate on only one agency.[92]

Thus, after USDA abolished the desk officer positions, OCRE's involvement in providing technical assistance to the agencies has been extremely limited. Furthermore, since OCRE does not have regular contact with recipients of USDA assistance, it is likely to have limited knowledge of the USDA programs, and it is not clear that OCRE can effectively monitor USDA agencies' compliance programs.

Although OCRE's compliance review manual requires OCRE to evaluate each agency head at least once every 5 years,[93] during fiscal years 1992 and 1993, OCRE conducted onsite reviews of only five USDA agencies.[94] OCRE performed three reviews of the Agricultural Stabilization and Conservation Service, one review of the Farmers Home Administration, and one review of the Forest Service. The review of the Agricultural Stabilization and Conservation Service primarily concentrated on headquarters operations.[95] As a result of these evaluations or audits of the five agency heads, OCRE found the following deficiencies: 1) employees did not receive training on their civil rights responsibilities; 2) program participation data were not kept or evaluated; and 3) outreach programs were not conducted.[96] OCRE's evaluation of the Agricultural Stabilization and Conservation Service and the Farmers Home Administration revealed the following deficiencies: 1) continued underrepresentation of minorities and women on county committees; and 2) inadequate resources to implement effectively all compliance responsibilities.[97]

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[87] USDA Departmental Regulation 4330–1, p. 3.

[88] USDA/OCRE FY 1991 Implementation Plan, p. 8.

[89] USDA Departmental Regulation 4330–1, pp. 6–7.

[90] *Id.*, p. 7.

[91] USDA/OCRE FY 1990 Implementation Plan, p. 8.

[92] Montoya July 1994 letter, attachment, Q. 10.

[93] USDA/OCRE (OAE), *Civil Rights Compliance Review Manual*, p. 29.

[94] USDA/OCRE Survey, Q. 64, p. 47.

Thus, although OCRE is responsible for monitoring the Title VI enforcement programs of the USDA agencies, it has not conducted compliance reviews of most of the agencies over the past 2 years. David Montoya, the Director of OCRE, reported that the staffing decreases had a "tremendous negative impact" on compliance reviews.[98] According to him, "Title VI enforcement virtually came to a halt as resources were available to conduct only a few reviews."[99]

### Complaint Processing

Although the USDA agencies may conduct preliminary investigations of complaints of discrimination, OCRE is responsible for conducting all investigations of formal complaints of discrimination and issuing determinations of violations or compliance.[100] OCRE has a formal memorandum of understanding delegating complaint processing responsibilities to the Food and Nutrition Service. The Food and Nutrition Service investigates the complaints and recommends findings to OCRE, OCRE but issues the final determination.[101] Although OCRE does not have similar memoranda of understanding with the Farmers Home Administration or the Soil Conservation Services, these agencies also undertake complaint processing responsibilities.[102]

## Outreach and Education and Technical Assistance

### Outreach and Education

Effective outreach and education is fundamental to ensure adequate Title VI compliance program. When program beneficiaries are unaware of their rights under Title VI, they are unable to assert these rights and are unlikely to file complaints of discrimination with the funding agencies. According to OCRE's director, USDA's agency heads are primarily responsible for USDA's outreach and education activities.[103] OCRE does not publish information on programs that are administered by USDA agencies, such as the food stamp program.[104]

However, OCRE has conducted some limited outreach and education activities in recent years. OCRE publishes its nondiscrimination statement in languages other than English.[105] OCRE has developed a poster entitled "And Justice for All," which includes the Department's antidiscrimination statement and information on how to file a complaint.[106] The poster is in English and other languages such as Spanish, Vietnamese, and Korean.[107] That this poster is available in languages other than English is important to ensure that individuals with limited English proficiency have access to information about their rights under Title VI. However, OCRE provided no information about how widely the poster is distributed.

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[95] Ibid.

[96] Ibid., Q. 67, p. 52.

[97] Glickman letter, attachment, p. 4.

[98] Montoya July 1994 letter, attachment, Q. 7

[99] Ibid.

[100] USDA/OCRE Survey, Q. 25(j),(k), p. 19.

[101] *See* discussion below, pp. 282–83.

[102] *See* discussions below, pp. 302, 315.

[103] Montoya July 1994 letter, attachment, Q. 11.

[104] Ibid.

[105] Ibid., Q. 47, p. 40.

During the past 5 years, OCRE has consulted with or provided information to such community groups as the Farmers Legal Action Group, the Mexican American Legal and Educational Defense Fund, the Asian Law Forum, the National Association for the Advancement of Colored People, and the Emergency Land Loss Fund. OCRE procedures also require that community groups and minority organizations be contacted during compliance reviews. The purpose of these contacts is to ensure that USDA's programs are delivered in a nondiscriminatory manner and that there is public awareness of USDA programs.[108]

### Technical Assistance

OCRE provides technical assistance both to agency heads and to USDA program recipients. Until 2 years ago when USDA discontinued the desk officer function, the desk officers provided technical assistance and guidance to USDA civil rights staff. They also provided civil rights training and answered questions relating to compliance and complaint problems.[109]

Over the past several years, OCRE has provided technical assistance to 13 agency heads and their recipients onsite, by telephone, and through formal training sessions. OCRE may provide technical assistance upon request by the agency head, as a result of OCRE's findings during an evaluation of the agency head, or as a result of OCRE's recognition of an agency head's need for information.[110] For example, OCRE reported in its 1994 Civil Rights Implementation Plan that its staff would provide "assistance and guidance" to the USDA agency heads in complying with Title II of the Americans with Disabilities Act of 1990.[111]

## Staff Training

OCRE requires that all new employees in its civil rights/EEO units complete training in civil rights compliance.[112] In 1992 new full-time employees received inhouse training on Title VI, Title IX of the Education Amendment Act of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, the Equal Credit Opportunity Act, and Title VIII of the Fair Housing Amendments Act of 1968.[113]

USDA agencies provide training to their immediate civil rights staff and their regional staff.[114] OCRE is responsible for providing training to the USDA agencies on civil rights policies and assisting the agencies in the development of training materials.[115] OCRE oversees the USDA agencies in providing training to recipients and subrecipients. OCRE also provides direct training to State and local agencies upon request.[116] However, OCRE does not have an active or systematic program to train civil rights staff at the USDA agencies or USDA recipients.

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[106] USDA/OCRE Survey, Q. 48, p. 40.

[107] Montoya July 1994 letter, attachment, Q. 20.

[108] Ibid., Q. 19.

[109] *See* USDA/OCRE FY 1991 Implementation Plan, p. 9. USDA agencies provide training to their immediate (headquarters) civil rights staff and their field staffs. Glickman letter, attachment, p. 4.

[110] Montoya July 1994 letter, attachment, Q. 18.

[111] USDA/OCRE FY 1994 Implementation Plan, p. 5.

[112] USDA/OCRE Survey, Q. 49, p. 42.

[113] USDA/OCRE FY 1993 Implementation Plan, p. 6.

[114] USDA/OCRE Survey, Q. 25(i), p. 19.

### Data Collection and Reporting Requirements and Analysis

OCRE does not collect data on USDA programs. However, in its compliance review process, OCRE evaluates USDA agency heads to ensure that their data collection and analysis systems meet the standards laid out in Departmental Regulation 4330–1. OCRE does not require agency heads to submit an annual report. However, the Food and Nutrition Service (FNS) submits an annual report to OCRE.[117]

According to OCRE officials, both OCRE and agency civil rights staff evaluate the delivery of program benefits, eligibility criteria, and participation rates during compliance reviews. OCRE has developed a schedule of compliance reviews to ensure that each USDA agency head is in fact collecting such data. The evaluation of program participation data is a regular part of any OCRE review. OCRE would consider the lack of such data and analysis as an agency's noncompliance.[118]

As discussed below, there are indications that agency heads are not in total compliance with their data collection requirements. For instance, the Food and Nutrition Service (FNS) does not have a system to establish eligibility by racial/ethnic groups. FNS only collects racial/ethnic participation data in two of its programs—the food stamp and the women, infants and children (WIC) programs [119] Thus, OCRE is not monitoring effectively the data collection and reporting systems of the USDA agencies.[120]

## Role of the USDA Agencies in Title VI Enforcement

The USDA Title VI regulations,[121] Departmental Regulation 4330–1, and OCRE's compliance review manual[122] detail the civil rights responsibilities of the USDA agencies.

### Guidelines, Policies, and Procedures

OCRE's compliance review manual specifies that it is the responsibility of USDA agency heads to develop Title VI guidelines for each of their federally assisted programs or, if they determine that such guidelines are not necessary, to prepare and make available a written explanation.[123] However, neither Departmental Regulation 4330–1 nor the compliance manual give the agencies responsibilities for Title VI policy development.

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[115] USDA Departmental Regulation 4330–1, p. 3.

[116] Montoya July 1994 letter, attachment, Q. 8.

[117] USDA/OCRE Survey, Q. 62, p. 47.

[118] Montoya July 1994 letter, attachment, Q. 21.

[119] USDA/OCRE Survey, Q. 59, p. 45.

[120] FNS maintains that it has made sincere efforts to obtain eligibility data. OCRE and FNS "determined that the data were not accurate enough to be used in identifying problems or determining lack of minority participation. For example, in the Food Stamp Program, data is collected by household rather than by individuals." Glickman letter, attachment, p. 5.

[121] 7 C.F.R. Part 15 (1994).

[122] USDA/OCRE (OAE) *Civil Rights Compliance Review Manual*.

[123] Ibid., p. 29.

## Process of Title VI Enforcement

### Assurances of Nondiscrimination

Departmental Regulation 4330–1 places the responsibility for collecting, reviewing, approving, and monitoring assurances of nondiscrimination from recipients on the USDA agency heads.[124] The OCRE compliance review manual specifies that, to meet this requirement, agencies should 1) identify recipients and subrecipients; 2) execute written assurance agreements with each recipient; 3) keep assurance agreements current; and 4) include all applicable bases in the assurance agreements.[125] According to OCRE officials, "[a]ssurances of nondiscrimination are reviewed at several organization[al] levels depending on the structure of the agency." Assurances also may be reviewed at the national, regional, district, area, or State levels.[126] OCRE is responsible for evaluating the assurances during desk-audit reviews and onsite compliance reviews of agency operations.[127]

### Compliance Reviews

The USDA Title VI regulations require agency heads to review the activities of recipients to determine whether they are complying with Title VI.[128] These regulations do not specify how often these reviews should be conducted.

Departmental Regulation 4330–1 provides more detailed instructions for USDA agencies' compliance reviews. It requires agency heads to conduct "[r]egular, systematic inspections and evaluations" of its programs.[129] It also requires USDA agency heads to conduct preaward and postaward compliance reviews of recipients. Agency heads may conduct postaward reviews on a "cyclic" basis or on a "priority system," with priorities to be based on agency determinations of the potential for noncompliance within its various programs. The regulation gives agencies some latitude in determining how often to conduct reviews of their programs, noting that some programs may require annual reviews, while others may require a review every 3 to 5 years.[130]

In addition to these required compliance reviews, Departmental Regulation 4330–1 allows for two other forms of recipient reviews: assessment reviews and special field reviews.[131] Assessment reviews, which may either be desk-audit reviews or onsite reviews, are evaluations and/or inspections based on certain criteria such as receipt of a disproportionate number of complaints in a particular program or geographical area, or program data that indicate an unexplained decrease in minority participation in an agency program.[132] Special field reviews are unscheduled reviews performed when USDA has evidence that a program/recipient may be in noncompliance.[133] As noted above, the distinctions between these different types of compliance reviews are not made clear in the regulation. Departmental

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[124] USDA Departmental Regulation 4330–1, App. A, § 2(6), p. A–5.

[125] USDA/OCRE (OAE), *Civil Rights Compliance Review Manual*, p. 30.

[126] Montoya July 1994 letter, attachment, Q. 22.

[127] Ibid., Qs. 12,22.

[128] 7 C.F.R. § 15.5(a) (1994).

[129] USDA Departmental Regulation 4330–1, §§ 5,5; p. 2.

[130] *Id.* at § 8(a), pp. 4–5.

[131] *Id.* at § 8, p. 4.

[132] *Id.* at § 8(b), pp. 5–6.

[133] *Id.* at § 8(c), p. 7.

Regulation 4330–1 also gives guidance on what compliance review reports should contain.[134]

Although Departmental Regulation 4330–1 is more detailed and provides more procedural guidance on the method of Title VI enforcement than USDA's Title VI regulations,[135] it still gives agency heads too much latitude in their Title VI enforcement programs. For instance, it does not specify how often recipients should be subjected to compliance reviews or priorities for selecting recipients for review. The OCRE compliance review manual provides more detailed guidelines on compliance reviews.[136]

### Complaint Investigations

Although OCRE has primary responsibility for investigating complaints and reaching findings of compliance or noncompliance, Departmental Regulation 4330–1 gives agency heads responsibility for forwarding all complaints to OCRE for processing. When asked to do so by OCRE, agency heads conduct preliminary inquiries and prepare reports containing suggested findings. Agency heads also are responsible for ensuring that recipients take corrective action if noncompliance is discovered during an inquiry.[137] To fulfill these responsibilities, agencies must 1) develop written complaint processing procedures; 2) train employees on the procedures; 3) forward discrimination complaints to OCRE within 5 days of receipt; and 4) monitor State agencies authorized to handle complaints.[138]

### Effecting Compliance

When an agency head has found a recipient in noncompliance, Departmental Regulation 4330–1 requires the agency head to notify the recipient in writing and give the recipient 30 days in which to take corrective action. In the event that the agency head cannot obtain voluntary compliance within 60 days, the agency head must report noncompliance status to OCRE. OCRE, with the assistance of the agency head, will determine what corrective action will be undertaken to achieve voluntary compliance. OCRE has the additional responsibility, in those cases where compliance has not been achieved within a 60-day period, to report the facts of the noncompliance to the Department of Justice.[139]

When an agency head decides to use formal enforcement procedures, such as the termination of assistance, the agency head must notify the recipient of the decision and supply OCRE with all necessary information. However, OCRE makes the final decision, in conjunction with the USDA Office of General Counsel.[140]

### Outreach and Education

Departmental Regulation 4330–1 gives USDA agencies the responsibility of ensuring that all programs include a public notification system to inform participants and applicants (minority and nonminority) of their program rights and responsibilities, the USDA policy of nondiscrimination, and procedures for filing a complaint.[141] The regulation lists several necessary components of an effective public notification system. These include informing applicants and participants, particularly non-English-speaking minorities, of their rights and responsibilities and ensuring that each recipient or program office takes steps to inform the general public, community leaders, grassroots organizations, and referral sources about their programs and applicable civil rights requirements.[142]

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[134] *Id.* at § 9, pp. 8–9.

[135] 7 C.F.R. Part 14 (1994).

[136] USDA/OCRE (OAE), *Civil Rights Compliance Review Manual*, pp. 31–32.

[137] USDA Departmental Regulation 4330–1, App. A, section 2(5), pp. A–4 - A–5.

[138] USDA/OCRE (OAE), *Civil Rights Compliance Review Manual*, p. 34. Agencies such as the Farmers Home Administration have developed a process to implement these responsibilities. Glickman letter, attachment, p. 4.

[139] USDA Departmental Regulation 4330–1, section 10, p. 9.

[140] *Id.*, App. B, section 2(b), pp. B–2 - B–3.

[141] *Id.*, App. A, section 2(1), p. A–2.

A 1994 study on Title VI enforcement in the State of Tennessee noted USDA's contention that one of the most important areas in the compliance review process is effective public notification. According to the report, USDA "emphasizes tailoring public notification to the demographics of an area."[143] The report recommends using newsletters, newspapers, local organizations and community leaders to educate the public about Title VI. The Department of Agriculture reported to the State of Tennessee that a lack of complaints is a "red flag" that beneficiaries are unaware of their rights.[144]

### Technical Assistance

Departmental Regulation 4330–1 requires agency heads to provide training as ongoing technical assistance to recipients at all levels and to ensure that such technical assistance covers specific civil rights areas.[145]

## Oversight of Continuing State Programs

The USDA agency heads provide general oversight and coordination of Title VI programs with State and local agencies, and with other grantees or recipients.[146] The USDA Title VI regulations require that the States[147] have methods of administration which give reasonable assurance that the applicant and all recipients will comply with Title VI.[148] However, USDA has published only minimal policies, guidelines, or procedures detailing the specific obligations of USDA agencies with respect to continuing State programs. Thus, the agency heads lack guidance from OCRE in this area. OCRE's compliance manual merely requires USDA agencies to "require these state programs to assign civil rights responsibilities to designated persons and to comply with minimum standards, including maintenance of records necessary to permit [OCRE] to determine compliance of state agencies."[149]

## Staff Training

The USDA agency heads are responsible for training agency civil rights staff on their responsibilities.[150]

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[142] *Id.*, App. A, section 2(1), pp. A–2, A–3.

[143] W.R. Snodgrass, Comptroller of the Treasury, Office of Local Government, State of Tennessee, *Tennessee State Agencies and Title VI of the Civil Rights Act of 1964* (January 1994), p. 7.

[144] Ibid., p. 7.

[145] USDA Departmental Regulation 4330–1, App. A, section 2(7), p. A–5.

[146] USDA/OCRE Survey, Q. 25, pp. 18–20. The USDA agencies conduct preaward (desk-audit) reviews, postaward reviews, compliance reviews of agency contract and grant processes. They administer the contracts and loans for Federally assisted programs, provide outreach and education to recipients, grantees and subgrantees, beneficiaries, potential beneficiaries, eligible organizations, and affected communities, as well as train State and local agencies and recipient staff. Ibid.

[147] Including a State Extension Service, but not including an institution of higher education. 7 C.F.R. § 15.4(b) (1994).

[148] *Id.* § 15.4 (b) (2).

[149] USDA/OCRE (OAE) Compliance Review Manual, p. 29.

[150] USDA Departmental Regulation 4330–1, App. A, section 2(7), p. A–5.

## Data Collection and Reporting Requirements and Analysis

The USDA Title VI regulations require recipients to have available data showing the extent to which minorities are beneficiaries of their programs and to submit to USDA agency heads such compliance reports as the agency heads deem necessary for determining the recipients' compliance with Title VI.[151] Under Departmental Regulation 4330–1, the USDA agency heads are responsible for ensuring that each recipient or program office has a data collection system and that the data are maintained for 3 fiscal years.[152] OCRE's compliance review manual's chapter describing the necessary elements of an agency head's civil rights program states that the agencies' data collection systems "should identify eligible populations and document the quantity and quality of benefits and services delivered to all groups. The system should obtain data on all significant aspects of program participation including representation of minorities and women on local committees, boards and councils."[153] The manual lists eight minimum standards for agency heads' data collection and analysis. Agencies should:

- Collect participation data by race, sex, national origin, and handicap for all federally assisted and federally conducted programs and activities;
- Evaluate programs to determine the numbers of beneficiaries by race, sex, national origin, and handicap;
- Identify potential beneficiaries and applicants by race, sex, and national origin;
- Analyze applicable census data;
- Analyze participation data to determine whether minorities, women, and persons with handicaps are being adequately served in proportion to their availability and eligibility;
- Analyze representation on planning and advisory bodies to determine whether minorities, women, and persons with disabilities are adequately represented;
- Assess evaluations to determine whether minorities, women, and persons with disabilities are treated differently in eligibility, membership, enrollment, admission, and other requirements for participation in USDA programs; and
- Implement affirmative steps to correct any deficiency in underrepresentation of programs.[154]

These data requirements are comprehensive. They provide sufficient information to allow USDA agencies to conduct thorough preaward and postaward desk-audit reviews of applicants or recipients.

### Civil Rights Implementation Plans

Agency heads are responsible for preparing and submitting to OCRE their own annual Civil Rights Implementation Plans. OCRE coordinates their effort and submits the plans to the Department of Justice.[155]

## Findings and Recommendations

### USDA Title VI Regulations

**Finding:** Although the U.S. Department of Agriculture's (USDA) Title VI regulations are generally adequate, they are outdated. For example, they have not been updated to reflect clarifications presented in the Civil Rights Restoration Act of 1987 on Title VI's coverage provision, defining expressly the phrase "programs and activities." Furthermore, the appendix listing the

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[151] 7 C.F.R. § 15.5(b) (1994).

[152] USDA Departmental Regulation 4330–1, App. A, section 2(2), p. A–3.

[153] USDA/OCRE (OAE), *Civil Rights Compliance Review Manual*, p. 35.

[154] Ibid, pp. 35–36.

[155] USDA Departmental Regulation 4330–1, section 12, p. 10. For a further discussion on the importance of civil rights implementation plans, see chap. 4, pp. 181–84.

USDA federally funded programs covered by Title VI has not been updated since 1988.[156]

**Recommendation:** USDA should update and revise its Title VI regulations to reflect the definition of "programs and activities" presented in the Civil Rights Restoration Act of 1987. In addition, each year, USDA should publish a revised list of its federally assisted programs in the *Federal Register*.

## Organization, Budget, Staffing, and Workload—Office of Civil Rights Enforcement

### Organization

**Finding:** The Office of Civil Rights Enforcement (OCRE) has undergone numerous structural changes and name changes over the past 15 years. These reorganizations have created considerable upheavals among the civil rights staff and impaired seriously the ability of OCRE to enforce Title VI.[157]

**Recommendation:** OCRE should focus its efforts on rebuilding its Title VI enforcement program. Although OCRE should implement further organizational changes that are dictated by the needs of the Title VI enforcement program, such as those recommended below, OCRE should manage any restructuring to ensure smooth transitions and no significant interruptions to OCRE's day-to-day Title VI enforcement activities.

**Finding:** Under the latest reorganization of OCRE, the office has taken on responsibilities for internal civil rights enforcement in addition to its previous responsibilities in the area of external civil rights enforcement. Furthermore, OCRE will not have a separate unit devoted to external civil rights enforcement activities. A probable consequence is that USDA's Title VI enforcement program may suffer as OCRE responds to pressures to improve USDA's internal civil rights program.[158]

**Recommendation:** USDA should organize OCRE into two separate units, with different supervisory staff, devoted to internal and external civil rights enforcement. Each of these units should have its own distinct staff. Thus, USDA should transfer those functions of the Compliance and Enforcement Division that relate to USDA's internal civil rights responsibilities out of the Division.

**Finding:** The Director of OCRE is several layers removed in USDA's chain of command from the Secretary of Agriculture. Not only does this low status suggest that USDA does not place a high priority on civil rights enforcement, but it does not give OCRE's Director sufficient access to the Secretary to ensure that civil rights issues are integrated fully into USDA policy and resource decisions.[159]

**Recommendation:** USDA should demonstrate the high priority it places on civil rights enforcement by removing OCRE from its current placement in the Office of Administration. The director of OCRE should report directly to the Secretary of Agriculture.

### Budget, Staffing, and Workload

**Finding:** Although USDA's budget includes a separate earmark for civil rights activities, including both internal and external civil rights, it does not have a separate amount designated for Title VI implementation and enforcement. Furthermore, USDA does not track its resources, staff, and expenditures on Title VI separately from those on other external civil rights activities.[160]

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[156] *See* p. 252.

[157] *See* pp. 255–56.

[158] *See* p. 256.

[159] *See* pp. 253–56.

[160] *See* pp. 256–58.

**Recommendation:** OCRE should implement an information management system that allows it to track its resources and expenditures separately for each of its civil rights activities. OCRE should integrate this information management system fully into its civil rights planning. Specifically, OCRE should use the information management system to support and develop its annual civil rights enforcement plan.

**Finding:** Although OCRE's external civil rights workload has increased substantially over time, its budget and staff resources for external civil rights functions have declined.[161]

**Recommendation:** OCRE should conduct a thorough study of its external civil rights resources and responsibilities to determine whether OCRE's existing resources, if well managed, are sufficient for OCRE to fulfill its current external civil rights responsibilities. If OCRE can demonstrate that its existing resources prevent it from enforcing Title VI and other external civil rights statutes adequately, then OCRE should make a formal request for additional resources for external civil rights enforcement.

## Regulations, Guidelines, Policies, and Procedures

### Regulations

**Finding:** OCRE's Departmental Regulation 4330–1, which establishes policy and provides guidance to USDA agencies on compliance reviews, lays a strong foundation for USDA's Title VI implementation and enforcement program. However, the regulation's discussion of the different types of compliance reviews USDA conducts is unclear.[162]

**Recommendation:** OCRE should revise its Departmental Regulation 4330–1 to clarify the differences between the different types of compliance reviews that USDA conducts. In particular, the revised regulation should discuss clearly the distinction between 1) compliance reviews of recipients conducted by OCRE or by a USDA agency head and 2) program reviews conducted by OCRE or a USDA agency head's primary civil rights office of USDA offices responsible for day-to-day Title VI enforcement activities.

**Finding:** OCRE's Departmental Regulation 4300–4, which requires USDA agencies to identify and address the civil rights implications of proposed agency actions before the agencies implement them, is a powerful mechanism for ensuring that civil rights is integrated fully into USDA programs as they are implemented.[163]

**Recommendation:** OCRE should take an active role in ensuring that the promise of Departmental Regulation 4300–4 is fulfilled. OCRE should provide technical assistance to USDA agencies to permit them to conduct thorough civil rights impact analyses of their programs, review and comment on agencies' civil rights impact analyses regularly, and ensure that USDA abandons programs with harmful civil rights impacts or modifies them to remove the negative impact or barrier to equal opportunity or access.

### Policies

**Finding:** OCRE has not fulfilled its responsibility to develop Title VI policy for USDA. It has not issued any policy statements on Title VI.

**Recommendation:** OCRE should take an active role in developing and disseminating USDA's Title VI policies. For instance, OCRE should issue policy statements on the implications of the Civil Rights Restoration Act of 1987 for Title VI enforcement for USDA-funded programs. Furthermore, OCRE should issue guidance to the USDA agencies on how Title VI enforcement is affected by the congressional initiatives to transform many USDA programs into block grant programs.

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[161] *See* pp. 256–58.

[162] *See* pp. 258–59.

[163] *See* p. 259.

### Procedures

**Finding:** OCRE's compliance review manual is detailed and comprehensive, but it has several deficiencies. In particular, it does not give specific time frames for completing tasks nor does it address the legal standards for discrimination under Title VI. Furthermore, it suffers from the same lack of clarity as Departmental Regulation 4330–1, particularly in its discussion of different kinds of compliance reviews.[164]

**Recommendation:** OCRE should revise its compliance review manual to provide specific timetables for completing tasks, to include a discussion of the legal standards used in determining compliance with Title VI, and to clarify the manual's discussion of compliance reviews. In particular, the manual should distinguish clearly reviews of recipients to ensure compliance with Title VI and oversight reviews of USDA offices' Title VI implementation and enforcement programs.

### Guidelines

**Finding:** OCRE does not provide the USDA agencies with adequate guidance on their obligations with respect to continuing State programs.[165]

**Recommendation:** OCRE should issue guidance to the USDA agencies on their obligations with respect to continuing State programs. In particular, the guidance should spell out the relative responsibilities of USDA agencies and the States for ensuring Title VI compliance in continuing State programs. Furthermore, the guidance should indicate that agencies must require States to submit methods of administration and should provide information on the types of information that should be included in an acceptable methods of administration. The guidance also should indicate that the agencies must require States to submit annual self-assessment on their Title VI compliance programs. Finally, the guidance should indicate that the agencies must conduct periodic reviews of States' Title VI compliance programs.

## OCRE Oversight, Coordination, and Monitoring of Agency Heads' Title VI Enforcement

**Finding:** One of OCRE's chief responsibilities is to oversee, coordinate, and monitor the USDA agency heads' Title VI implementation and enforcement programs. However, since declining resources led OCRE to discontinue the position of desk officer, staff members who were assigned to oversee specific USDA agencies, OCRE has not fulfilled this responsibility adequately. OCRE has not conducted reviews of most of the agencies within the past 2 years.[166]

**Recommendation:** USDA should request the necessary resources to allow OCRE to restore the position of desk officer and to provide adequate monitoring and oversight of the USDA agencies' Title VI programs. OCRE should have at least one desk officer for each of the USDA agencies with Title VI compliance programs. Desk officers should conduct regular monitoring reviews of the agencies' Title VI programs. These reviews should include site visits, interviews with USDA recipients, beneficiaries, and community groups, evaluations of the agencies' data collection and analysis systems, and analysis of agencies' compliance review files. OCRE should provide feedback reports to USDA agencies on deficiencies and recommendations for improvement. The USDA agencies should be required to take corrective action to comply with USDA Title VI regulations, procedures, and guidelines within 90 days of receiving the feedback report.

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[164] *See* p. 269.

[165] *See* p. 259.

[166] *See* pp. 260–61.

## Complaint Processing

**Finding:** Although OCRE has formal responsibility for complaint investigation and issuing findings of compliance or noncompliance for all USDA agencies, the USDA agencies each perform some complaint processing functions. However, OCRE only has a formal memorandum of understanding delegating such responsibilities to one agency, the Food and Nutrition Service.[167]

**Recommendation:** OCRE should enter into formal memoranda of understanding with all USDA agencies performing Title VI complaint processing functions. The memoranda of understanding should detail clearly the relative roles and responsibilities of OCRE and the agencies. They should require the agencies to notify OCRE of all complaints received and their disposition and send to OCRE for a final determination all complaints that the agencies have investigated. Agencies may make preliminary investigations and attempt to reach voluntary compliance agreements, but these should be forwarded to OCRE for review. OCRE should retain ultimate responsibility for USDA's processing, investigation, and disposition of complaints, and make all formal recommendations for sanctions.

## Outreach and Education and Technical Assistance

### Outreach and Education

**Finding:** OCRE's involvement in outreach and education activities is limited. With the exception of the dissemination of a civil rights poster and occasional contacts with civil rights and community groups, OCRE leaves outreach and education on Title VI to the USDA agencies. Given the critical role of outreach and education in Title VI enforcement, OCRE's limited involvement in outreach and education is inadequate.[168]

**Recommendation:** OCRE should spearhead a departmentwide campaign to educate USDA recipients, program participants, intended beneficiaries, and the general public about their rights and responsibilities under Title VI. This campaign should include the fashioning of a department-wide outreach and education strategy, which clearly delineates the relative responsibilities of OCRE and the agency heads, the development of informational material, and participation in conferences and workshops attended by USDA recipients and program participants.

### Technical Assistance

**Finding:** Since OCRE discontinued the position of desk officer, it has provided only limited technical assistance to the USDA agency heads. OCRE has not provided technical assistance regularly, but primarily when agencies request it. Furthermore, most of the assistance OCRE has provided recently has focused on the Americans with Disabilities Act of 1990, not Title VI.[169]

**Recommendation:** OCRE should reinstate the position of desk officers assigned to each agency head. Desk officers should provide regular technical assistance to the agency heads. Desk officers should ensure that they provide the necessary assistance on all of the civil rights statutes enforced by USDA, including Title VI. They should provide technical assistance proactively, not just when the agencies request assistance. Thus, desk officers should provide technical assistance during the course of their monitoring reviews of agencies' Title VI programs, as well as when changing circumstances warrant the provision of assistance. For instance, as block grants become a more prominent feature of agencies' programs, desk officers should provide technical assistance on ways to conduct effective Title VI enforcement for block grant programs.

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[167] *See* p. 261.

[168] *See* pp. 261–62.

[169] *See* p. 262.

## Staff Training

**Finding:** OCRE trains its new civil rights staff adequately. However, OCRE has very limited involvement in training the civil rights staff at the USDA agency heads. Although OCRE is responsible for overseeing the agencies' training programs and developing training materials for the agency heads, the Commission received no evidence indicating that OCRE actively fulfills this responsibility.[170]

**Recommendation:** OCRE should take a leadership role with USDA to ensure that all USDA civil rights staff, as well as program staff, have the necessary training on Title VI. OCRE should develop a comprehensive Title VI training manual to assist the agency heads in training their civil rights staff. In addition, OCRE should develop materials to explain Title VI requirements to the agencies' program staff. Finally, OCRE should monitor the agencies' training programs to ensure their adequacy and, when necessary, provide annual Title VI training to agency compliance staff.

## Data Collection, Reporting, and Analysis

**Finding:** OCRE does not require that the USDA agency heads provide it with an annual report on their Title VI enforcement programs.[171]

**Recommendation:** OCRE should require each USDA agency to submit an annual report on its Title VI enforcement program to OCRE. The annual reports should include information on the agencies' civil rights organization and structure, budget and staffing, complaints received, compliance reviews conducted, staff training, and outreach and education and technical assistance activities. In addition, the reports should include analyses comparing the participants in the agencies' federally funded programs with the relevant applicant pools and eligible populations, as well as of the populations adversely affected by the federally funded programs, by race, color, and national origin. OCRE should review and comment on these reports annually and use them to assist it in more in-depth monitoring reviews of the agencies' Title VI programs.

**Finding:** OCRE's Departmental Regulation 4330–1 and its compliance review manual provide detailed and comprehensive instructions to the USDA agencies on their data collection systems. These requirements should be sufficient to permit the USDA agencies to conduct thorough preaward and postaward desk-audit reviews of applicants or recipients.[172]

**Recommendation:** OCRE should retain its current requirements for agency heads' data collection and analysis systems. Other agencies should consider patterning their data requirements after the requirements in OCRE's Departmental Regulation 4330–1 and its compliance review manual.

**Finding:** OCRE is responsible for ensuring that the USDA agency heads comply with data collection and analysis requirements. However, not all of the agency heads comply with these requirements. Thus, OCRE does not effectively monitor the data collection and reporting systems of the USDA agencies.[173]

**Recommendation:** OCRE should review annual reports submitted by the USDA agency heads to ensure that the agencies are in compliance with data collection and analysis requirements. Furthermore, OCRE should ensure that data collection and analysis are incorporated as a critical area in each of OCRE's monitoring reviews of agencies' Title VI programs.

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[170] *See* pp. 262–63.

[171] *See* p. 263.

[172] *See* pp. 243–65.

[173] *See* pp. 266–67.

## Food and Nutrition Service

The Food and Nutrition Service (FNS) is one of two USDA agencies reporting to the Assistant Secretary of Food and Consumer Services.[174] The mission of FNS is to help combat poverty-related hunger and malnutrition through the administration of food stamp and direct food distribution programs, school lunch and school breakfast programs, child care food programs, and other special food programs.[175]

### The FNS Federally Assisted Programs

In 1993, FNS administered 15 different Title VI programs[176] through approximately 324,000 State and local recipient agencies:[177]

- The *food stamp program*[178] improves diets of low-income households by increasing their food purchasing ability. The State or U.S. Territory agency responsible for federally aided public assistance programs submits requests for funding to the FNS.[179]

- The *nutrition assistance program for Puerto Rico* is the block grant signoff of the food stamp program to improve diets of needy persons in Puerto Rico.[180]

- The *food distribution (food donation) program*[181] makes food available to State agencies for distribution to qualifying outlets such as soup kitchens and food banks to improve the diets of school and preschool children, the elderly, needy persons in charitable institutions, and individuals who need food assistance.[182]

- The *food distribution program commodities on Indian reservations*[183] improves the diets of needy persons in households on or near Indian reservations and increases the market for domestically produced foods acquired under surplus removal or price support operations.[184]

- The *national school lunch program*[185] assists States, through cash grants and food donations, in making the school lunch program available to school students and encourages

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[174] Office of the Federal Register, National Archives and Records Administration, *The United States Government Manual 1994/1995* (Superintendent of Documents: Washington, D.C., 1994), p. 115.

[175] U.S. Department of Agriculture, Food and Nutrition Service, "Fiscal Year 1991 Civil Rights Implementation Plan," p. 1 (hereafter cited as USDA/FNS 1991 FY Implementation Plan).

[176] 7 C.F.R. § 15, App. A to Subpart A (1994) (hereafter cited as Appendix to Subpart A).

[177] USDA/FNS FY 1991 Implementation Plan, p. 1. The 1991 is an update of the previous year's plan and includes FNS activities from fiscal year 1990 through fiscal year 1993. Ibid.

[178] Appendix to Subpart A.

[179] Office of Management and Budget and U.S. General Services Administration, *1993 Catalog of Federal Domestic Assistance* (Superintendent of Documents: Washington, D.C., 1993), vol. 1, p. 69 (hereafter cited as *Catalog of Federal Domestic Assistance*).

[180] Appendix to Subpart A; *Catalog of Federal Domestic Assistance*, vol. 1, p. 82.

[181] Appendix to Subpart A.

[182] *Catalog of Federal Domestic Assistance*, vol. 1, p. 69.

[183] Appendix to Subpart A.

[184] *Catalog of Federal Domestic Assistance*, vol. 1, p. 83.

[185] Appendix to Subpart A.

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the domestic consumption of nutritious agricultural commodities.[186]

- The *special milk program*[187] offers grants to States or U.S. territories, as well as public and nonprofit private school or child care institutions, to provide subsidies to schools and institutions to encourage the consumption of milk by children.[188]

- The *school breakfast program*[189] assists States in providing a nutritious nonprofit breakfast service for school students, through cash grants and food donations.[190]

- The *summer food service program for children*[191] assists States, through grants, to conduct nonprofit food service programs for needy children, especially during the summer months when schools are closed for vacation.[192]

- The *child (and adult) care food program*[193] assists States, through grants-in-aid, to maintain nonprofit food service programs for children and elderly or impaired adults in public and private nonprofit institutions providing care.[194]

- The *nutrition education and training program*[195] helps to subsidize State and local programs that encourage the dissemination of nutrition information to children participating in the school lunch and related child nutrition programs.[196]

- The *special supplemental food program for women, infants and children (WIC)*[197] provides grants to State health departments, Indian tribes, and the Indian Health Service to provide supplemental nutritious foods, nutrition education, and referrals to health care to low-income pregnant women, infants, and children up to age 5.[198]

- The *commodity supplemental food program*[199] includes agreements between the Department of Agriculture and State agencies or Indian tribes to improve the health and nutritional status of low-income pregnant, infants, children up to 6 years old, and elderly persons through the donation of supplemental food.[200]

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[186] *Catalog of Federal Domestic Assistance*, vol. 1, p. 72.

[187] Appendix to Subpart A.

[188] *Catalog of Federal Domestic Assistance*, vol. 1, p. 74.

[189] Appendix to Subpart A.

[190] *Catalog of Federal Domestic Assistance*, vol. 1, p. 71.

[191] Appendix to Subpart A.

[192] *Catalog of Federal Domestic Assistance*, vol. 1, p. 77.

[193] Appendix to Subpart A.

[194] *Catalog of Federal Domestic Assistance*, vol. 1, p. 76.

[195] Appendix to Subpart A.

[196] *Catalog of Federal Domestic Assistance*, vol. 1, p. 80.

[197] Appendix to Subpart A.

[198] *Catalog of Federal Domestic Assistance*, vol. 1, p. 75.

[199] Appendix to Subpart A.

[200] *Catalog of Federal Domestic Assistance*, vol. 1, p. 81.

- The *temporary emergency food assistance program*[201] provides grants to States for food commodities that are distributed to needy persons.[202]

- The *State administrative expenses for child nutrition program*[203] provides State agencies with funds for administrative expenses in supervising and giving technical assistance to local schools, school districts, and institutions in their implementation of child nutrition programs.[204]

- The *nutrition assistance program for the Commonwealth of the North Mariana Islands*[205] is a food stamp program for eligible residents.

In fiscal year 1993, FNS's total appropriation for federally assisted programs was approximately $35 billion.[206] Although FNS employs only 2 percent of USDA's personnel and is considered to be one of the Department's smaller agencies, in 1994 the agency was responsible for administering the largest (in dollars) Title VI programs at the Department—the food assistance programs.[207]

## Organization, Budget, Staffing, and Workload of the FNS Civil Rights Enforcement Function

### Present Organization

The office with primary responsibility for enforcing Title VI and other relevant civil rights laws at FNS is its Civil Rights Division (FNS/CRD). FNS/CRD has both internal and external civil rights responsibilities.[208] In addition to Title VI, FNS/CRD enforces Title VII of the Civil Rights Act of 1964;[209] section 504 of the Rehabilitation Act of 1973,[210] the Age Discrimination Act of 1975,[211] and Title IX of the Education Amendments of 1972.[212]

The Director of FNS/CRD does not report to the FNS' top official, nor is the Director a "deputy" at FNS. The Director reports to FNS' Deputy Administrator for Management,[213] who in turn reports to the FNS Administrator.[214] According to Larry Brantley, the Director of FNS/CRD, reporting to a deputy does not adversely affect his ability to carry out his civil rights responsibilities. He is satisfied with the line of authority at FNS because a senior manager represents him in organizational and operational matters. At the same time, he has direct access to the FNS Administrator, who often requests his assistance on crucial civil rights matters.[215]

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[201] Appendix to Subpart A.

[202] *Catalog of Federal Domestic Assistance*, vol. 1, p. 84.

[203] Appendix to Subpart A.

[204] *Catalog of Federal Domestic Assistance*, vol. 1, p. 78.

[205] Appendix to Subpart A.

[206] U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Agriculture, Food and Nutrition Service, Q. 41, p. 30 (hereafter cited as USDA/FNS Survey).

[207] Larry Brantley, Director, and Gloria McColl, Title VI Program Manager, Civil Rights Division, Food and Nutrition Service, U.S. Department of Agriculture, interview in Washington, D.C., June 24, 1994, p. 1 (hereafter cited as Brantley and McColl interview).

[208] *See* ibid.

[209] 42 U.S.C. §§ 2000e–2000e17 (1988 & Supp. V 1993). *See* USDA/FNS Survey, Q. 21, p. 16. FNS civil rights staff are also responsible for handling internal EEO counseling under Title VII. *See* Brantley and McColl interview, p. 1.

[210] 29 U.S.C. § 794 (1988 & Supp. V 1993).

[211] 42 U.S.C. §§ 6101–6107 (1988).

[212] 20 U.S.C. §§ 1681–1688 (1988).

[213] USDA/FNS Survey, Q. 20, p. 16; *see also* Brantley interview, documents provided, document no. 7, "Organizational Chart."

Within FNS/CRD, the Civil Rights Program, headed by a manager, is responsible for Title VI enforcement, as well as other external civil rights activities. The Equal Opportunity Program, also headed by a manager, is responsible for internal civil rights matters.[216]

The FNS/CRD headquarters (Civil Rights Program) staff are responsible for 1) developing, initiating, reviewing and monitoring the FNS civil rights program; 2) training and providing technical assistance to regional offices and State and local officials; 3) processing civil rights complaints, including issuing determinations of violations or compliance; 4) conducting civil rights reviews; and 5) coordinating FNS' assistance to historically black colleges and universities.[217]

In addition to the FNS/CRD staff, all located at the FNS headquarters office, FNS regional office staff have civil rights enforcement responsibilities. FNS has a civil rights director in each of its seven regional offices.[218] The regional civil rights directors, who have both internal and external civil rights responsibilities, are responsible for monitoring the civil rights activities of the State agencies receiving FNS funding and providing technical assistance and civil rights training to regional, State, and local officials.[219] They conduct preaward (desk-audit) reviews, postaward (desk-audit) reviews, and onsite compliance reviews.[220]

The regional civil rights directors report to the regional administrators. However, all of their policies, guidelines, and instructions come from FNS/CRD,[221] and their contact with headquarters is through FNS/CRD. Although the regional civil rights directors report directly to the regional administrators, FNS/CRD has access to the regional civil rights directors through the regional administrators. For example, FNS/CRD sends correspondence to the regional administrator, who then relays the instructions to the regional civil rights directors.[222] FNS/CRD "holds the

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[214] USDA/FNS 1991 Implementation Plan, p. 5.

[215] Brantley and McColl interview, p. 2.

[216] *See* ibid., p. 1.

[217] USDA/FNS FY 1991 Implementation Plan, p. 5. Unlike the other agency heads that submitted surveys, FNS can determine violations/compliance. *See* USDA/FNS Survey, Q. 25(k), p. 19. This responsibility is usually delegated to OCRE. However, the Memorandum of Understanding with OCRE concerning shared responsibility for complaints processing provides FNS with the authority to determine violations/compliance. *See* Memorandum of Understanding between the Food and Nutrition Service and the Office of Advocacy and Enterprise (1985), pp. 1–4.

[218] USDA/FNS Survey, Q. 37, p. 27. The offices are located in Robbinsville, New Jersey; Chicago, Illinois; Boston, Massachusetts; Denver, Colorado; Atlanta, Georgia; Dallas, Texas; and San Francisco, California.

[219] USDA/FNS FY 1991 Implementation Plan, p. 5.

[220] USDA/FNS Survey, Q. 25(e), p. 18.

[221] Brantley and McColl interview, p. 2.

[222] Ibid.

Regional Administrators accountable" for implementing its instructions and directives. FNS/CRD tracks each action requested by the regional administrator to ensure completion.[223]

The structure of civil rights enforcement at FNS creates several potential problems. First, FNS combines internal and external civil rights responsibilities in the same office and, in the case of the regional civil rights directors, in the same person. Such an organization may compromise external civil rights enforcement if the FNS focuses on improving internal civil rights/EEO effectiveness.[224] Furthermore, although the Director of FNS/CRD reported that his lack of direct authority over the regional civil rights directors has not impeded FNS' Title VI enforcement, it probably hampers FNS/CRD's ability to ensure that regional staff fulfill their responsibilities. Finally, the low level of the FNS/CRD within the agency can prevent it from receiving sufficient resources to conduct an effective civil rights enforcement program.

### USDA Reorganization

Under the USDA departmentwide reorganization plan, FNS falls under one of the six major missions. FNS has merged with the current Office of the Consumer Advisor under the new name, "Food and Consumer Service." It reports to the Under Secretary for Food, Nutrition, and Consumer Services, an upgraded position title for the current Assistant Secretary for Food and Consumer Services.[225]

According to a 1994 FNS internal update memorandum on the USDA reorganization plan, the civil rights function will remain under the Deputy Administrator for Management.[226] The "Office of Civil Rights" at FNS will report to the Deputy Administrator for Management for day-to-day matters. However, under the reorganization, the Director of the civil rights office will have "direct policy access and close contact" with the administrators for the Food, Nutrition, and Consumer Services and the Nutrition Research and Education Service.[227]

The rationale presented for establishing the Office of Civil Rights as a separate office reporting to the Deputy Administrator for Management is threefold:

1) The Deputy Administrator will be responsible for resource allocation and administrative services to and accountability for a proactive civil rights program, while at the same time, the Director of the civil rights office will have the authority to deal with the agency administrators on all civil rights matters;

2) Civil rights oversight will remain a line management function rather than a staff function, which, according to the memorandum, reinforces the responsibility of program managers to make civil rights oversight an "integral part" of program delivery and fosters the "continual assessment of the civil rights impact of all policy decisions; and

3) The plan promotes a "team approach," especially between the agency's personnel division (which also would report to the Deputy Administrator for Management) in managing EEO, providing civil rights training, managing special emphasis programs and administering

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[223] Ibid.

[224] FNS believes there is more integrity in civil rights by having the internal EEO function located in the Civil Rights Division rather than the Personnel Office as in some agencies. Glickman letter, attachment, p. 5. Although it is essential for FNS to retain its internal EEO functions in the Civil Rights Division rather than in a personnel or human resources offices, it is equally important to separate the internal EEO functions from FNS/CRD's external civil rights enforcement obligations.

[225] *Team USDA Summary*, p. 1.

[226] Ellen Haas, Assistant Secretary, Food and Consumer Service, U.S. Department of Agriculture, memorandum to the Deputy Secretary of Agriculture, "Reorganization Plan Update," Feb. 9, 1994.

[227] Ibid., p. 2.

the equal opportunity/civil rights "critical performance element."[228]

It is uncertain how the reorganization will affect FNS/CRD's ability to enforce Title VI. The reorganization proposes to reassign 12 FNS positions to OCRE. Although FNS/CRD does not expect to lose existing positions, FNS/CRD's director indicated that his staff could apply for the new civil rights positions in OCRE. This may leave FNS/CRD and the FNS regional offices without experienced civil rights staff. The Director emphasized that any movement to create a "centralized" civil rights program at USDA is not appropriate. In his view, given that so many USDA agencies have different federally assisted programs and activities, one civil rights office would impede effective civil rights enforcement.[229]

### Budget, Staffing, and Workload

The FNS budget includes a specific amount for FNS/CRD, but not a separate amount designated for external civil rights or Title VI implementation and enforcement.[230] FNS does not have in place a management structure that allows it to make informed decisions about how it allocates resources across the civil rights statutes it enforces. Thus, Title VI enforcement at FNS could be jeopardized by transferring resources for Title VI to other civil rights statutes without FNS making a formal decision to do so.[231]

FNS' total civil rights budget has increased from $500,000 in 1988, to almost $900,000 in 1993.[232]

As of June 1994, FNS/CRD had three FTEs assigned to the Civil Rights Program, which is responsible for enforcing Title VI. These staff include a program manager and two equal opportunity specialists.[233] In addition, the seven regional civil rights directors spend about 75–80 percent of their time on external civil rights activities, with the remainder of their time on Title VII/EEO matters.[234]

The FNS headquarters and regional civil rights staffing levels have remained constant since 1988.[235] However, the agency's civil rights responsibilities increased with the enactment of the Americans with Disabilities Act and decreased with the consolidation of EEO complaint adjudication to the departmental office (OCRE) and with the adoption of the Equal Employment Opportunity Commission's revised complaint processing regulations.[236] Although FNS did not indicate that other program responsibilities affected its capacity to enforce Title VI in the last 5 years,[237] FNS/CRD reported that "the lack of resources the agency (FNS) is willing to commit to compliance reviews and training" has impeded FNS/CRD's performance in these two areas.[238] Thus, Title VI enforcement in these two areas has suffered. Adequate resources are necessary if FNS is to fulfill its responsibility of ensuring enforcement of Title VI in all Federal programs administered or funded by FNS.

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[228] Ibid.

[229] Brantley and McColl interview, p. 4.

[230] USDA/FNS Survey, Q. 29, p. 20.

[231] FNS maintains that, "From year to year, however, resource allocations have changed to emphasize certain aspects of the civil rights program. Therefore, FNS' Title VI enforcement is not jeopardized by the allocation of resources." Glickman letter, attachment, p. 5. Although the allocation may not jeopardize funding for staff salaries, the funding available to conduct Title VI programs, such as training or outreach and education, may be affected.

[232] USDA/FNS Survey, Q. 33, p. 23.

[233] Brantley and McColl interview, p. 1. FNS/CRD also has an EEO staff of one program manager and one equal opportunity specialist. Ibid.

[234] Brantley and McColl interview, p. 1.

[235] Ibid., documents provided, document no. 2, "Full time staff for Title VI: 1988–1994."

[236] 29 C.F.R. § 1614 (1994).

[237] USDA/FNS Survey, Qs. 26–28, pp. 19–20.

## Instructions, Policies, Procedures, and Guidelines

In addition to the USDA Title VI regulations and Departmental Regulation 4330-1, FNS operates under its own instructions.[239] These instructions include an "umbrella" instruction entitled "Civil Rights Compliance and Enforcement," which lays out FNS' general civil rights enforcement procedures[240] and the relative responsibilities of different FNS components.[241] In addition, FNS has specific instructions for each of its major federally assisted programs. These are: 1) the special supplemental food program for women, infants, and children (WIC) and the commodity supplemental food program; 2) the food distribution program; 3) the child care program; 4) the school nutrition program; 5) the food stamp program, and 6) the summer food service program.[242] The program-specific instructions promulgate specific guidance on nondiscrimination in the administration of the programs, delegate authorities, and specify the responsibilities, requirements, and procedures necessary to seek Federal, State and local compliance with civil rights laws.[243]

All federally assisted programs administered by FNS are covered by the (umbrella) instruction and the separate civil rights instructions for each of the designated FNS programs.[244] Therefore, FNS has complied with the Department of Justice requirement that each Federal agency issue Title VI guidelines for each of its federally assisted programs.[245] Moreover, FNS has taken into consideration the diversity of its Title VI programs and the need for separate requirements in order to enforce Title VI effectively. Thus, FNS' instructions serve as a comprehensive and sound basis for its Title VI enforcement program.

In addition to these instructions, FNS/CRD recently revised and issued civil rights complaint processing procedures to the regional administrators.[246]

## Process of Title VI Enforcement

All of FNS' direct recipients are State and local agencies. FNS does not have cooperative agreements or memoranda of understanding with State agencies.[247] However, FNS delegates to State agencies considerable responsibility for ensuring compliance with Title VI and other civil rights laws. Generally, the States are responsible for ensuring that they and their subrecipients are in compliance; the FNS regional civil rights directors are responsible for monitoring the States to ensure that they are carrying out this responsibility; and FNS/CRD headquarters staff are responsible for monitoring the regional offices.[248]

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[238] Ibid., Q. 82(c), p. 54.

[239] U.S. Department of Agriculture, Food and Nutrition Service, *Civil Rights Compliance and Enforcement*, Instruction 113 (1982) (hereafter USDA/FNS Instruction 113).

[240] *Id.*; USDA/FNS FY 1991 Implementation Plan, p. 2. The umbrella instruction lays out procedures for notifying the public of their civil rights under FNS programs, data collection and reporting, compliance reviews, resolution of noncompliance, compliance work plans, complaint investigation, collecting assurances of nondiscrimination, and civil rights training. *See* USDA/FNS Instruction 113.

[241] *Id.*, p. 1.

[242] *Id.*, sections 113-1 to 113-8. Section 113-5 has been deleted.

[243] USDA/FNS FY 1991 Implementation Plan, p. 2.

[244] USDA/FNS Instruction 113-1 (Applicability), p. 2.

[245] 28 C.F.R. § 42.404 (1993).

[246] Brantley interview, documents provided, document no. 11, Civil Rights Division, memorandum to Regional Administrator, All Regions, "Civil Rights Complaint Processing Procedures" (hereafter cited as USDA/FNS Complaints Processing Procedures).

[247] USDA/FNS Survey, Q. 30, p. 21.

FNS/CRD monitors the performance of regional civil rights directors through an automated "tracking" report that informs the Division staff how well the directors are implementing Title VI. Furthermore, FNS/CRD receives quarterly reports on the States' Title VI activities. These reports address complaint processing only.[249]

### Preaward Reviews

The USDA Title VI regulations require that all applicants provide a written assurance that the federally funded program or activity will not discriminate.[250] The State and regional staff review the applications and assurances. The FNS instructions require State or regional civil rights officials to determine if all State and local agency applicants are in compliance with civil rights requirements before approving assistance.[251] They can base such determinations on either desk-audit or onsite[252] preaward reviews.[253] When preaward reviews indicate that an applicant is in probable noncompliance, the applicant is given the opportunity to take corrective action within a specified time frame.[254]

However, despite the formal requirement of preaward reviews, FNS generally conducts preaward reviews only for programs in which a high degree of turnover exists among recipients. For example, the food stamp and school lunch programs undergo few, if any, preaward reviews because their recipients, for the most part, remain the same.[255] FNS/CRD attributed the limited preaward compliance effort to lack of resources that FNS is willing to commit to compliance.[256] Without sufficient resources, FNS will be unable to ensure that applicants for all programs administered or funded by FNS are in compliance with Title VI before they receive Federal funds. Even in programs in which recipients remain the same and apply for grant renewals, preaward reviews are necessary. If a recipient is committing discriminatory practices, a preaward review will identify the discrimination. Then FNS can facilitate correction of any noncompliance before the discrimination continues to affect potential and actual program employees, subrecipients, beneficiaries, and the affected communities.

The FNS regional civil rights directors conduct preaward reviews for the Regional Office Administered Programs (ROAP). The ROAP programs include the summer food service program for children and the child care food program, as well as some Indian tribal programs.[257] The regional offices work directly with the recipients of ROAP programs, which are local organizations or Indian tribes that provide services to their respective constituents.[258] These programs require preaward reviews because, unlike most of the other food programs, programs under ROAP have a high turnover of recipients and beneficiaries.[259]

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[248] USDA/FNS Instruction 113–1, Part 4, p. 4–1. FNS places responsibility on States through its Instructions, rather than through a formal delegation agreement.

[249] Brantley and McColl interview, p. 3.

[250] 7 C.F.R. § 15.4 (1994). *See also* USDA Departmental Regulation 4330–1.

[251] USDA/FNS Instruction 113–1, Part 4, IIA, pp. 4–1 - 4–2.

[252] USDA/FNS Survey, Q. 42, p. 32. Onsite preaward compliance reviews are conducted when information obtained during a desk-audit review is insufficient to make a written determination of compliance. *See also*, USDA/FNS Instruction 113–2—113–8.

[253] *Id.*, section 113–1, Part Four, Compliance Reviews, p. 4–1; USDA/FNS Survey, Q. 42, p. 32.

[254] USDA/FNS Instruction 113–1, Part 4, IIA, pp. 4–1 - 4–2.

[255] Brantley and McColl interview, p. 5.

[256] USDA/FNS Survey, Q. 82(c), p. 54.

[257] Ibid, p. 6.

FNS/CRD relies on the States to conduct all other preaward reviews. The regional civil rights directors receive information from the States concerning the preaward reviews and, in turn, submit a report of the findings to FNS/CRD. Any problems uncovered in the preaward reviews are resolved before the applicant is approved for financial assistance or program participation.[260] Although FNS/CRD monitors the States through their quarterly reports, it is not clear that such monitoring is sufficient to ensure that the States are conducting thorough and comprehensive preaward reviews and ensuring that deficiencies are corrected before funds are released to their subrecipients.[261]

In fiscal year 1992, FNS conducted 97 desk-audit and 67 onsite preaward reviews. The following year FNS conducted fewer desk-audit reviews (35), but more onsite reviews (111).[262] None resulted in the denial of an award or in an award conditioned on corrective action.[263]

### Postaward Reviews

The current system of compliance reviews relies primarily on States because FNS/CRD and the regional civil rights directors do not have the resources to conduct pre- or postaward reviews.[264] To ensure compliance at the State level, FNS has an integrated civil rights approach to reviews. The States review the recipient agencies, the regional civil rights directors review the States, and FNS/CRD reviews the regional office directors. FNS/CRD expects all those involved to produce quality reviews.[265] However, this system of review depends on FNS/CRD allocating sufficient resources to its monitoring activities. According to FNS/CRD's Director, FNS/CRD should conduct onsite reviews of regions at least once every 2 years; it does not meet this goal because of insufficient travel resources.[266] Thus, unless additional resources are committed to reviewing FNS' regions and the States, FNS cannot guarantee that its compliance reviews are effective.

FNS' instructions on compliance reviews are extremely thorough and comprehensive. FNS conducts onsite reviews as an integral part of management evaluation reviews of the programs.[267] The FNS instructions discuss several types of civil rights review, including "routine reviews" of subrecipients and "special reviews." FNS conducts special reviews as followups based on noncompliance findings from routine reviews and preaward reviews. It also performs special reviews when participation data indicate that a particular minority group is not participating or benefiting from the program.[268] The instructions also discuss FNS regional office reviews, which are not postaward reviews.[269] The instructions give the recipient State agency and the regional civil rights directors the responsibility for conducting routine reviews, the regional civil rights directors and FNS/CRD the responsibility for conducting special reviews, and FNS/CRD the responsibility for conducting the regional office reviews.[270]

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[258] Ibid.

[259] Ibid.

[260] Ibid., p. 5.

[261] FNS stated that it monitors State agency compliance through ongoing Management Evaluation Reviews. Glickman letter, attachment, p. 6. According to FNS, "These reviews are sufficient to ensure that the States are conducting thorough and comprehensive preaward reviews and ensuring that deficiencies are corrected before funds are released to their subrecipients." Ibid.

[262] USDA/FNS Survey, Qs. 41(e),(f), pp. 30–31.

[263] Ibid., Qs. 41(g)(h), p. 31.

[264] Brantley and McColl interview, p. 5.

[265] Ibid.

[266] Brantley and McColl interview, p. 5.

[267] *See* USDA/FNS Instruction 113–1, Part Four, Compliance Reviews (D), p. 4–3.

The program-specific instructions provide more detailed procedures for conducting the reviews. For example, the instructions for the WIC program specify that State agencies are responsible for routine reviews of subrecipients and that the regional civil rights directors are responsible for reviewing all State agencies. The instructions also provide criteria for selecting subrecipients for compliance reviews and give specific instructions on the content of State agency reviews and subrecipient reviews.[271]

FNS completed 1,804 onsite compliance reviews in fiscal year 1993. Of these, 1,782 resulted in findings of compliance and 22 resulted in findings of noncompliance. FNS resolved the cases of noncompliance through recipients' commitments to take corrective actions.[272] For example, various requests for corrective action resulted in retroactive awards of food stamps to beneficiaries.[273]

### Complaint Investigations

Since October 1985, FNS has had a written memorandum of understanding with OCRE.[274] Under this memorandum, FNS has responsibility for processing civil rights complaints for its federally assisted programs.[275] FNS/CRD receives all complaints and determines whether or not they are civil rights complaints. If it cannot achieve voluntary agreement, FNS refers the complaints to OCRE, with a recommendation for corrective action.[276] FNS must process all discrimination complaints within 60 calendar days of receipt by FNS.[277] FNS/CRD submits a quarterly report on its complaint processing to OCRE.[278] OCRE retains overall responsibility and authority for complaint handling, processes appeals, and monitors FNS activities through reporting systems and onsite followup.[279]

The purpose of the memorandum of understanding was to establish parameters for a pilot project under which FNS had responsibility for processing its discrimination complaints under Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments Act of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and the USDA and FNS regulations.[280] The pilot project began as a test to increase the efficiency of FNS' discrimination complaint process and specifically to:

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[268] *Id.*, p. 4–2

[269] *Id.*

[270] *Id.*

[271] *Id.*, section 113–2, p. 9–10.

[272] USDA/FNS Survey, Q. 68, p. 44. These numbers include the first-level State agency recipients to which direct payments are made for administering FNS programs. The figures do not include the "enormous" number of subrecipients.

[273] Ibid., Q. 77, p. 50.

[274] U.S. Department of Agriculture, "Memorandum of Understanding between the Food and Nutrition Service and the Office Of Advocacy and Enterprise" (1985) (hereafter cited as USDA/FNS & OCRE Memorandum of Understanding).

[275] Ibid., p. 1.

[276] Ibid., pp. 1–18.

[277] Ibid., p. 1.

[278] Brantley and McColl interview, p. 3.

[279] USDA/FNS & OCRE Memorandum of Understanding, p. 1.

1) improve the timeliness of responses to complainants; 2) improve the quality and timeliness of reports; and 3) maximize the use of resources such as travel funds and personnel.[281] Although originally the pilot project was to end in 1986, a revised agreement extended the memorandum of understanding with OCRE for a 5-year period beginning in October 1992.[282]

The memorandum of understanding was the official beginning of the decentralization of civil rights activities at USDA.[283] Before the memorandum, all agencies' complaints went through OCRE for processing. As a result, some complaints were lost, and backlog of complaints occurred.[284] The memorandum has allowed FNS to reduce the complaint processing time from 175 to approximately 60 days. Furthermore, the memorandum of understanding allows FNS/CRD to resolve problems immediately.[285]

The memorandum of understanding has allowed State agencies to become more involved in complaint processing. Two years ago, FNS revised the original memorandum to standardize FNS' complaints process at all levels.[286] In less than a year, FNS began to include the States in its assessment of complaint processing. FNS/CRD prepared instructions on complaint processing for the States.[287] Under the present monitoring system, FNS has found only a small number of complaints from the States where the resolution was not satisfactory.[288]

The regional civil rights directors perform complaint processing. They submit a report within 30 days after a request by FNS/CRD. FNS/CRD staff analyze the reports for quality.[289]

FNS received an increasing number of civil rights complaints between the mid–1980s and 1992, when it received 555 civil rights complaints, of which 170 were filed only under Title VI.[290] The number of complaints FNS received decreased significantly between 1992 and 1993, when FNS received 447 complaints in all, of which 105 were filed exclusively under Title VI.[291] This decline may indicate a failure on the part of FNS or the States to conduct adequate outreach and education on civil rights in general and Title VI in particular.

### Deficiencies, Remedies, and Sanctions

FNS has found the following types of deficiencies among its recipients: 1) no provision of bilingual services; 2) poor accessibility for individuals with disabilities; 3) rude treatment; and 4) no display of OCRE's "And Justice for All" poster.[292]

When the FNS identifies a particular compliance, recipient agencies have 30 days to achieve voluntary compliance. If they have not completed

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[280] Ibid., p. 7.

[281] Ibid., p. 1.

[282] USDA/FNS Complaints Processing Procedures, p. 1.

[283] Brantley and McColl interview, p. 3.

[284] Ibid.

[285] Ibid.

[286] Ibid., p. 4.

[287] Ibid.

[288] Ibid.

[289] Ibid, p. 3. According to FNS, the Civil Rights Division provides leadership and guidance for the regional civil rights directors. The regional civil rights directors are responsible for conducting preliminary inquiries and submitting a report on a complaint within 30 days after FNS/CRD requests it. Glickman letter, attachment, p. 6.

[290] USDA/FNS Survey, Q. 71, p. 46. These figures do not include complaints filed under multiple statutes including Title VI.

[291] Ibid. These figures do not include complaints filed under multiple statutes including Title VI.

[292] USDA/FNS Survey, Q. 67, p. 43.

or planned corrective action within the 30-day time frame, the FNS reports the problem to USDA's OCRE for appropriate action. OCRE will initiate formal enforcement proceedings when it determines that the recipient agency will not voluntarily comply.[293] Although the instructions provide for the termination of funds,[294] FNS cannot make that determination or carry out such an action. Only the Secretary of USDA can initiate this sanction. USDA regulations outline the procedures for this action.[295] FNS reported that it has not had situations in which formal or legal enforcement action was necessary.[296]

### Outreach and Education

FNS indicated that there are no "systematic problems in providing food assistance programs to low income households."[297] However, FNS acknowledged that ensuring that people with limited English proficiency know about the programs and receive information in their language was a problem.[298] Generally, FNS publicizes program information to its recipients through posters, brochures, and all materials discussing the programs that are distributed to the public.[299] For example, every food stamp coupon booklet has a nondiscrimination statement on it.[300] The materials name the FNS Administrator as the contact person for allegations of discrimination, not the Director of FNS/CRD.[301] Materials are provided in languages other than English based on the need in a particular project area.[302] For example, FNS' ". . . And Justice for All" poster contains a nondiscrimination statement in English, Spanish, Chinese, Japanese, and Vietnamese.[303]

The FNS/CRD Director indicated that FNS should perform more outreach and education to the general public and, specifically, to communities with large non-English-speaking populations. He did note that FNS' regional offices have provided the Division with a list of grassroots contacts.[304] The Western Regional Office reported that its contact with grassroots organizations depends on the type of complaint. "For instance, in [a complaint by a homeless person], we looked for and found organizations that worked with the homeless, single adults, the needy. If a complaint or a problem, or review concerns [the Americans with Disabilities Act of 1990 or section 504 of the Rehabilitation Act of 1973], then we look for organizations that work with or help those with disabilities."[305]

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[293] USDA/FNS FY 1991 Implementation Plan, p. 9.

[294] USDA/FNS Instruction 113–1, Part 5, p. 5–3.

[295] 7 C.F.R. § 15.8(c) (1994).

[296] USDA/FNS Survey, Q. 79, p. 51.

[297] Ibid., Q. 82(b), p. 54.

[298] Ibid.

[299] Ibid., Q. 46, p. 35.

[300] Brantley and McColl interview, p. 5.

[301] USDA/FNS Survey, Q. 48, p. 41.

[302] Glickman letter, attachment, p. 6.

[303] Ibid.

[304] Brantley and McColl interview, p. 6. *See also* Brantley and McColl interview, documents provided, document no. 1, "Civil Rights Grassroots Contacts." FNS regional offices use grassroots contacts in conducting preliminary inquiries. FNS selects grassroots organizations for contact based on the nature of complaints. For example, according to FNS, "for a complaint filed by a homeless individual, FNS will look for organizations that work with the homeless, single adults, and the needy. If a complaint problem, or review concerns the Americans with Disabilities Act FNS will look for organizations that work with persons with disabilities." Glickman letter, attachment, p. 6.

### Technical Assistance

FNS civil rights staff also conduct "periodic" training sessions with State-level program officials who have responsibility for program delivery on all compliance requirements.[306] The regional civil rights directors visit State agencies at least on an annual basis and offer these agencies technical assistance.[307] Regional civil rights directors also conduct training seminars periodically for recipients.[308] FNS staff offer assistance upon request and also initiate technical assistance by contacting grassroots advocacy groups.[309]

## Staff Training

FNS does not provide formal Title VI training to its civil rights staff. Most of the training on Title VI is on-the-job training. In 1989, USDA offered a Title VI training course at its Graduate School. However, the course is no longer provided, and there has not been any other specific Title VI course at the Department since that year.[310] The Director of FNS/CRD indicated that there was a need for formal Title VI training.[311]

However, FNS does provide comprehensive civil rights training to new regional office staff. FNS/CRD brings the regional offices' new staff to its office for training.[312] The training usually includes instruction on civil rights statutes, as well as data collection, public notification, and complaint processing requirements and procedures.[313] The Title VI program manager is the primary instructor. She developed the Division's "training package" for use in these staff training workshops.[314] FNS/CRD's Title VI program manager indicated that she planned to include her staff in the regional staff training as a way of providing them with "refresher" training on civil rights.[315]

## Oversight of State Agencies

As noted above, FNS gives States the responsibility of conducting self-assessments to ensure that they are in compliance with Title VI. FNS reports that it has moved toward decentralization of compliance responsibilities, making State agencies partners in civil rights compliance matters.[316] During the last 5 years, FNS has worked with State agencies who operate the food assistance programs to establish a cooperative team approach to all aspects of civil rights compliance. This effort tries to resolve issues at the lowest level to avoid delays and strain on limited Federal resources.[317]

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[305] Brantley and McColl interview, documents provided, document no. 1, "Civil Rights Grassroots Contacts," memorandum from Glenda Johnson, FNSWRO to Gloria McColl.

[306] USDA/FNS Survey, Q. 51, p. 36.

[307] Ibid., Q. 54, p. 37.

[308] Ibid., Q. 52, p. 36.

[309] Ibid., Q. 54, p. 37.

[310] Brantley and McColl interview, p. 6.

[311] Ibid.

[312] Brantley and McColl interview, p. 6.

[313] *See* ibid., documents provided, document no. 5, "Training Overview" (no page numbers).

[314] Brantley and McColl interview, p. 6; ibid., documents provided, document no. 5, "Training Overview."

[315] Brantley and McColl interview, Franklin Chow's notes, p. 6.

[316] USDA/FNS Survey, Q. 82, p. 54.

As part of the decentralization process, FNS has instituted certain systems protections, including appeal rights and review and tracking systems. As a result of these efforts, more problems are being resolved locally.[318] However, in its assessment of this effort, FNS has found "some States accept the responsibility to operate a compliance program, while others give it low priority and are not willing to police their own area."[319]

FNS reported that the routine monitoring of State agencies is "the most important phase of an effective Title VI enforcement plan."[320] However, to a large extent FNS/CRD relies on annual State self-assessment reports.[321] Although a more proactive approach to monitoring States would be preferable, FNS only institutes special compliance reviews when these reports indicate a problem.[322]

## Data Collection, Reporting Requirements, and Analysis

The individual FNS instructions provide procedures for collecting, evaluating, and analyzing the data. FNS uses the data to determine how effectively FNS programs are reaching minority groups, to select locations for compliance reviews, and to prepare annual reports to OCRE.[323] FNS program managers review their program guidelines and are responsible for collecting and analyzing minority and ethnic data to determine racial characteristics of the affected community.[324]

FNS maintains a national data bank that allows it to collect and analyze racial/ethnic participation data for each FNS-assisted program, but it does not collect data on eligible participants. Furthermore, FNS collects participation data by racial and ethnic groups annually in the food stamp program and biennially in the WIC program.[325] However, FNS does not have a system for establishing eligibility by racial/ethnic groups and comparing participation rates to eligibility rates.[326]

Although FNS collects participation data, it does not compare them with census data. The FNS includes the data in its Civil Rights Implementation Plans and uses it to observe trends in program participation from year to year. It does

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[317] Ibid., Q. 39, p. 29.

[318] Ibid., Q. 82(a), p. 54.

[319] Ibid., Q. 82(d), p. 54.

[320] USDA/FNS FY 1991 Implementation Plan, p. 8.

[321] According to FNS, it relies on ongoing Management Evaluation Reviews to assess the civil rights compliance of State agencies. Glickman letter, attachment, p. 7.

[322] *See* Brantley and McColl interview, pp. 3, 5.

[323] FNS Instruction 113–1, Part Three, Data Collection and Reporting, p. 3–1.

[324] USDA/FNS Survey, Q. 25(e) (f), p. 18.

[325] Glickman letter, attachment, p. 7. *See also* Brantley and McColl interview, p. 6; USDA/FNS Survey, Q. 59, p. 39. *See also*, Brantley interview, documents provided, document no. 6, Food and Nutrition Service, Financial Management Program Information Division, Data Base Monitoring Branch, June 1992, January 1993, and November 1993, "Commodity Supplemental Food Program (CSFP) For Women, Infants, Children and Elderly Racial Participation," for April 1993 and April 1992; "Food Stamp Program, Racial Ethnic Household Participation," July 1991.

[326] Brantley and McColl interview, p. 6.

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not use the information in enforcement activities. The data are strictly information for the agency.[327]

FNS' data collection and analysis system has not improved since a 1975 U.S. Department of Justice report, which criticized FNS' failures to "implement USDA civil rights directives to obtain and evaluate racial and ethnic participation and eligibility data in the food stamp program."[328] FNS cannot fully determine whether its programs operate in compliance with Title VI without a system that allows it to compare program participants with the eligible population.

## Civil Rights Implementation Plans

The Commission reviewed FNS' Civil Rights Implementation Plans for fiscal years 1991, 1992, and 1993. The 1991 Civil Rights Implementation Plan is its base year plan covering the goals and objectives during the 3-year period.[329]

In the fiscal year 1991 Civil Rights Implementation Plan, FNS presented four long-range goals and four major objectives.[330] The long-range goals were: 1) efforts to make State agencies more of a "cooperator and partner" in all compliance activities; 2) initiatives aimed at more support for the 1890 land grant universities; 3) new methods for reviewing and evaluating programs for civil rights compliance, including the use of data, desk reviews and onsite reviews; and 4) streamlining the civil rights complaints process.[331]

The 1991 Civil Rights Implementation Plan also listed major objectives to achieve the four major goals: 1) developing additional training methods for State agency personnel; 2) exploring new methods of reviewing and evaluating programs for civil rights compliance; 3) using available information such as racial/ethnic data, desk reviews and other compliance reports to assist in assessing the compliance posture of State agencies; and 4) developing a complaint processing system that allows for more State agency handling of complaints.[332]

Generally, FNS' goals and objectives focus on improving communication guidance and training efforts with its State and local agency recipients. Regional civil rights directors plan to conduct routine monitoring and civil rights training for State agencies during training seminars, onsite visits, and other compliance enforcement activities.[333] The goals and objectives also address initiatives to conduct systematic and planned FNS civil rights' programs training for agency head civil rights/EEO staff.[334]

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[327] Ibid. *See also* ibid., documents provided, document no. 4, "Partial Listing of Data Fields for the 'Tracking' System."

[328] U.S. Department of Justice, Civil Rights Division, Federal Programs Section, "Evaluation of Title VI Enforcement in the Food Stamp Division of the Food and Nutrition Service, U.S. Department of Agriculture," December 1975, p. 4. The report said, "[a] comparison of participation and eligibility data by race and ethnicity in disaggregate totals (e.g., by county) is fundamental to establishing priorities for indepth compliance reviews in large grant programs such as the food stamp program." Ibid. The Department of Justice concluded that "FNS has never reviewed the extent of nonparticipation by minority public assistance households although it has a data system which could, with slight modification, be used for that purpose." Ibid, p. 10. It further stated, "the FNS implementation of USDA racial/ethnic data policy with respect to the food stamp program represents something less than a maximum effort and falls considerably short of the ingenuity requested by the Secretary in designing an effective data system." Ibid., p. 7. Six of the report's 16 recommendations addressed the collection of racial and ethnic data for the food stamp program. *See* ibid., pp. 12–26.

[329] USDA/FNS FY 1991 Implementation Plan, p. 1.

[330] Ibid., pp. 11–12.

[331] Ibid.

[332] Ibid.

[333] U.S. Department of Agriculture, Food and Nutrition Service, "Fiscal Year 1993 Civil Rights Implementation Plan," p. 11.

[334] Ibid., p. 11.

The FNS plans do not conform to the guidelines promulgated by the U.S. Department of Justice.[335] The plans discuss generally the responsibilities of FNS/CRD, the regional civil rights directors, and the State agencies but do not give sufficient details on FNS' approach to civil rights enforcement for either the Department of Justice or the general public to evaluate their performance. The plans' goals and objectives do not indicate ways of measuring accomplishment or time frames for completion, as required by the Department of Justice. In addition, the plans do not have at least one major objective for each of the enforcement areas, such as complaint processing, preaward review, postaward review, enforcement monitoring, legal and administrative support, staff training, and technical assistance, as required by the Department of Justice. The plans do not discuss the goals and objectives in the context of the FNS budget, staffing, and workload. Finally, because the plans does not relate progress reports to the goals and objectives, it is impossible to assess whether the FNS has achieved its goals and objectives. Thus, the FNS plans do not accomplish the purpose for which they were designed by the Department of Justice. In particular, the FNS does not use them as management tools.

## Findings and Recommendations

### Organization, Budget, Staffing, and Workload

#### Organization

**Finding:** The organizational structure of civil rights enforcement at the Food and Nutrition Service (FNS) is inadequate in several respects. First, FNS combines internal and external civil rights responsibilities in the same office, its Civil Rights Division (CRD), and in the case of the regional civil rights directors, the same person. Thus, FNS does not have separate budget and staff for external civil rights activities. Second, the Director of CRD does not have line authority over the regional civil rights directors, who conduct most of the agency's day-to-day Title VI enforcement activities. Finally, the Director of CRD does not report directly to the Administrator of FNS.[336]

**Recommendation:** FNS should restructure its civil rights function. The civil rights office should be removed from the Office of Management, and its Director should report directly to the Administrator of FNS. FNS should have separate regional staff assigned to internal and external civil rights functions. Finally, regional civil rights staff should report to the head of the FNS' civil rights office and not to the regional administrators.

#### Budget, Staffing, and Workload

**Finding:** The FNS budget does not include a separate amount for external civil rights generally or Title VI specifically, nor does FNS have in place an information management system capable of tracking its expenditures on Title VI activities.[337]

**Recommendation:** CRD should put in place an information management system that permits it to track its expenditures on different civil rights activities. CRD should use the system to analyze its expenditures and resource assignments in relationship to its workload. CRD should use this information in developing an annual civil rights enforcement plan.[338]

**Finding:** Title VI enforcement at FNS has suffered because CRD's resources have remained constant as its overall civil rights workload has increased.[339]

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[335] U.S. Department of Justice, "Guideline for Agency Implementation Plans Required by Executive Order 12,250, 'Leadership and Coordination of Nondiscrimination Laws.'" These guidelines are discussed in chapter 4.

[336] *See* pp. 275–78.

[337] *See* p. 278.

[338] *See* p. 278.

[339] *See* p. 278.

**Recommendation:** CRD should use its information management system to analyze trends in its civil rights expenditures and workload across different civil rights activities and demonstrate the need for increased resources for Title VI enforcement. FNS should commit itself to providing the resources needed to perform effective Title VI enforcement.

## Instructions, Policies, Procedures, and Guidelines

**Finding:** FNS' civil rights enforcement instruction clearly spells out FNS' civil rights enforcement procedures and the relative responsibilities of different FNS components. Furthermore, FNS has program-specific instructions that satisfy the Department of Justice's requirement for separate Title VI guidelines for each federally assisted program. Therefore, FNS' instructions serve as a comprehensive and sound basis for its Title VI enforcement program.[340]

**Recommendation:** FNS should retain its existing internal Title VI instructions. Other USDA agencies should consider issuing similar instructions for their own federally assisted programs.

## Process of Title VI Enforcement

### Preaward Reviews

**Finding:** FNS has an active preaward review program. However, FNS relies heavily on States to conduct preaward reviews and does not adequately monitor the States' performance of their preaward review obligations. For instance, FNS does not require the States to submit information on their preaward reviews in their quarterly reports.[341]

**Recommendation:** FNS should extend its reporting requirements of States to ensure that the quarterly reports submitted by the States to the FNS regional civil rights directors include information on all applications for FNS assistance. FNS should require States to submit the following information for each application it receives:

- whether the State conducted a preaward review,
- a summary of the information considered in the review,
- a copy of the State's letter of finding, and
- information about any corrective actions required and whether the applicant agreed to implement them.

FNS should task its regional civil rights directors with reviewing the information on preaward reviews included in the States' quarterly reports, determining whether the States are fulfilling their responsibility of conducting reviews of each applicant prior to awarding funds, assessing the quality of the States' preaward reviews, and providing the States with technical assistance where necessary. FNS should assign additional civil rights staff to its regional offices to permit them to perform these duties effectively.

### Postaward Reviews

**Finding:** FNS has an active postaward review program. FNS' civil rights and program-specific instructions contain detailed postaward review procedures. FNS conducts a fair number of postaward reviews of its recipients each year. However, virtually all of these postaward reviews are conducted by State agencies, not FNS, and FNS does not monitor how well the States perform this task. Thus, FNS does not ensure that its compliance reviews of recipients are of sufficient quality to uncover and resolve instances of noncompliance with Title VI.[342]

**Recommendation:** FNS should extend its reporting requirements of States to incorporate a requirement that they include information on their compliance reviews in their quarterly reports. For all subrecipients, the States should provide the following information:

- whether the subrecipient underwent a postaward review,

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[340] *See* pp. 278–79.

[341] *See* pp. 280–81.

[342] *See* pp. 281–82.

- whether the review was onsite or desk audit,
- a summary of the information considered in the review,
- a copy of the letter of finding, and
- information about any corrective action required or taken.

The FNS regional civil rights directors should review the information in the States' quarterly reports, assess the quality of the States' postaward reviews, and offer technical assistance where necessary. In addition, periodically, the FNS directors should conduct postaward reviews jointly with the State civil rights staff to learn more about how the States conduct the reviews and to provide further technical assistance on how to conduct proper postaward reviews. FNS should assign additional civil rights staff to its regional offices to permit them to perform these duties effectively.

### Complaint Processing and Complaint Investigations

**Finding:** Under a memorandum of understanding with OCRE, FNS has been delegated responsibility for processing discrimination complaints relating to its federally assisted programs. FNS, in turn, delegates much of its complaint processing authority to States. FNS has prepared complaint processing instructions for the States. However, FNS does not have sufficient resources to monitor effectively the quality of the States' complaint investigation activities.[343]

**Recommendation:** FNS should assign sufficient civil rights staff to the FNS regional offices to permit them to monitor the quality of States' performance of their complaint processing and investigations responsibilities.

### Outreach and Education

**Finding:** Although FNS strives to meet the needs of limited-English-proficient persons, generally, FNS does not conduct sufficient outreach and education on Title VI.[344]

**Recommendation:** CRD should provide leadership to the FNS regional offices and State recipients on outreach and education. The Division should develop a strategic plan for informing the recipients, participants, beneficiaries, and the general public about Title VI and other civil rights statutes as they apply to FNS-funded programs. The strategic plan should clearly indicate the roles to be played by CRD, the FNS regional offices, and the State recipients in ensuring that FNS' outreach and education efforts are adequate. Not only should FNS include nondiscrimination statements in English and other languages on its printed materials, but it should use other means of providing information about Title VI, such as displaying nondiscrimination posters, developing a brochure explaining the civil rights requirements of each program, and providing information at conferences and other forums attended by program recipients, participants, and intended beneficiaries.

## Staff Training

**Finding:** Although the Director of FNS/CRD acknowledges that formal Title VI training is needed, FNS only provides formal civil rights training to its civil rights staff in the regional offices.[345]

**Recommendation:** In addition to providing formal civil rights training to new regional civil rights staff, FNS should provide formal Title VI training to all civil rights staff. FNS should ensure that all civil rights staff continue to receive formal training on a periodic basis, to refresh, deepen, and extend their Title VI knowledge and to keep them abreast of new Title VI developments. For instance, training should cover the implications of the Civil Rights Restoration Act of 1987 for Title VI enforcement and mechanisms for enforcing Title VI for block grant programs.

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[343] *See* pp. 282–83.

[344] *See* p. 284.

[345] *See* p. 285.

## Oversight of State Agencies

**Finding:** FNS delegates considerable responsibility for day-to-day Title VI enforcement to its State recipients, but does not monitor their Title VI compliance programs adequately. In particular, although FNS regional staff visit the States on an annual basis to provide technical assistance, FNS' monitoring of States relies primarily on annual self-assessment reports submitted by the States.[346]

**Recommendation:** FNS regional offices should conduct periodic, indepth monitoring reviews of the States' Title VI compliance programs. These reviews should begin with review of all quarterly and annual reports submitted by the States but be based primarily on onsite visits during which regional civil rights staff interview State civil rights staff, recipients, program participants, community groups, and civil rights groups; review the State compliance review and complaint investigation files; evaluate the States' procedures and data collection systems; and provide technical assistance to State staff.

## Data Collection, Reporting Requirements, and Analysis

**Finding:** FNS does not have in place an adequate system for collecting and analyzing data from recipients.[347]

**Recommendation:** CRD should develop and implement a data collection and analysis system. It should develop instructions specifying what sort of information States must collect from their subrecipients, including data by race, color, and national origin, on program participants, applicants, and the eligible population. In addition, it should create a system for analyzing the data it collects from States. This system should compare routinely the eligible population for FNS programs with program applicants and program participants, by race, color, and national origin. FNS should use this information to help it in determining whether protected groups are underrepresented in FNS-funded programs, and, if so, whether they face barriers to equal opportunity to participation in those programs.

## Civil Rights Implementation Plans

**Finding:** FNS' Civil Rights Implementation Plans do not conform to the requirements of the U.S. Department of Justice's "Guideline for Agency Implementation Plans Required by Executive Order 12,250, 'Leadership and Coordination on Nondiscrimination Laws.'"[348]

**Recommendation:** FNS should develop its Civil Rights Implementation Plans in conformance with the Department of Justice guidelines. In particular, FNS' Civil Rights Implementation Plans should provide a broad outline of FNS' Title VI enforcement program, including its scope, organization, budget, and staffing, and the extent to which it conducts various civil rights activities. Furthermore, the plans should develop the goals and objectives section and the progress report section in accordance with the Department of Justice's mandate that the plans be used as a management tool by FNS. Thus, goals and objectives should be precise, have specific timeframes for accomplishing them, and be based on a realistic assessment of budget and staff resources available for civil rights enforcement.

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[346] *See* pp. 285–86.

[347] *See* pp. 286–87.

[348] *See* pp. 287–88.

## Farmers Home Administration

The Farmers Home Administration (FmHA) provides supervised credit assistance through various loan and grant programs to rural residents. This assistance supports family farms, provides housing, provides economic support to disaster victims, and fosters rural economic development.[349] FmHA provides loans and grants for farm ownership and operating loans, rural rental housing and other facilities for the elderly, mutual self-help housing grants, area development recreational, technical assistance, and planning grants, and soil and water loans to associations.[350] In 1992, FmHA distributed $6.8 billion to 87,000 recipients, including State and local agencies, individuals, cooperatives and corporations, profit and nonprofit organizations, independent farmers and ranchers, and tenants.[351]

### The FmHA Federally Assisted Programs

FmHA administers the following federally assisted programs:

- Farm ownership loans assist eligible farmers, ranchers, and farming cooperatives[352] to install or improve recreational facilities or other nonfarm enterprises.[353]
- Farm operating loans to owners of family farms[354] to install or improve recreational facilities or other nonfarm enterprises.[355]

- Community facility loans[356] assist owner or tenant family farmers and ranchers in repairing or improving disaster victims' operations to financially sound basis.[357]

- Rural rental housing and related facilities for elderly persons and families of low income[358] that construct, purchase, improve, or repair rental or cooperative housing.[359]

- Rural cooperative housing[360] loans to individuals, cooperatives, nonprofit organizations, State or local agencies, and other organizations to construct, purchase, or improve rural cooperative housing.[361]

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[349] U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Agriculture, Farmers Home Administration, attachment 1, "Organization" (hereafter cited as USDA/FmHA Survey).

[350] 7 C.F.R. § 15 Appendix A to Subpart A (hereafter Appendix to Subpart A).

[351] U.S. Department of Agriculture, Farmers Home Administration, "Fiscal Year 1992 Civil Rights Implementation Plan," workload and performance data, p. 11 (hereafter cited as USDA/FmHA FY 1992 Implementation Plan); *Catalog of Federal Domestic Assistance*, vol. 1, pp. 50–64.

[352] Ibid., p. 51.

[353] Appendix to Subpart A.

[354] *Catalog of Federal Domestic Assistance*, vol. 1, p. 50.

[355] Appendix to Subpart A.

[356] Ibid.

[357] *Catalog of Federal Domestic Assistance*, vol. 1, p. 48.

[358] Appendix to Subpart A.

[359] *Catalog of Federal Domestic Assistance*, vol. 1, p. 54.

[360] Appendix to Subpart A.

[361] *Catalog of Federal Domestic Assistance*, vol. 1, p. 54.

- Rural housing site loans[362] to assist private or public nonprofit organizations interested in providing sites for housing and to acquire and develop lands in rural areas.[363]

- Farm and labor housing loans[364] to farmers, family farm partnerships, and corporations to construct, repair, or purchase year-round or seasonal housing.[365]

- Farm labor housing grants[366] to domestic farm laborers provide decent, safe, and sanitary low-rent housing and related facilities.[367]

- Mutual self-help housing grants (technical assistance grants)[368] provide financial support for programs of technical and supervisory assistance that will aid needy very-low- and low-income individuals and their families in carrying out self-help housing efforts in rural areas.[369]

- Technical and supervisory assistance grants[370] for nonprofit organizations to hire personnel who carry out a program of technical assistance for self-help housing in rural areas.[371]

- Individual recreation loans[372] help farmers, ranchers, and cooperatives carry out such projects as financing nonfarm enterprises and developing energy-conserving measures.[373]

- Recreation association loans[374] assist corporations, partnerships, and joint operations to finance nonfarm enterprises such as improving farm-forest projects.[375]

- Private enterprise grants[376] to cooperatives, corporations, and joint partnerships facilitate improvement, protection and proper use of farmland for conservation purposes.[377]

- Indian tribal land acquisition loans[378] are available to any recognized Indian tribe to acquire land within tribal reservations and Alaskan communities.[379]

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[362] Appendix to Subpart A.

[363] *Catalog of Federal Domestic Assistance*, vol. 1, pp. 53–4.

[364] Appendix to Subpart A.

[365] *Catalog of Federal Domestic Assistance*, vol. 1, p. 49.

[366] Appendix to Subpart A.

[367] *Catalog of Federal Domestic Assistance*, vol. 1, p. 49.

[368] Appendix to Subpart A.

[369] *Catalog of Federal Domestic Assistance*, vol. 1, p. 57.

[370] Appendix to Subpart A.

[371] *Catalog of Federal Domestic Assistance*, vol. 1, p. 57.

[372] Appendix to Subpart A.

[373] *Catalog of Federal Domestic Assistance*, vol. 1, p. 51.

[374] Appendix to Subpart A.

[375] *Catalog of Federal Domestic Assistance*, vol. 1, p. 51.

[376] Appendix to Subpart A.

[377] *Catalog of Federal Domestic Assistance*, vol. 1, p. 55.

[378] Appendix to Subpart A.

- Grazing association loans[380] to eligible farming partnerships, joint operations, and corporations to level lands, carry out basic land treatment for grazing, and for other related conservation measures.[381]

- Irrigation and drainage association[382] loans improve and protect farmlands through drainage of farmland and other related conservation measures.[383]

- Area development assistance planning grant program[384] provides funds to eligible organizations and individuals to plan and develop basic land treatment practices.[385]

- Resource conservation and development loans[386] to eligible applicants for conservation and land resource development.

- The rural industrial loan program[387] facilitates improvement for the proper use of farmland in rural areas.[388]

- The rural renewal and resource conservation development, land conservation and land utilization[389] program provides funds to eligible individuals and organizations to improve farmlands in rural areas.

- Soil and water conservation, recreational facilities and uses, and pollution abatement facilities loans[390] provide funds to eligible individuals and organizations to facilitate improvement and proper use of farmlands in many different areas, including forestation, water resource development and the development of pollution facilities.[391]

- Watershed protection and flood prevention program[392] provides funds to prevent damages due to flooding and other water buildup.

- Water and waste facility loans and grants[393] facilitate improvement and development of water resources and carry out pollution control and abatement on farms.[394]

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[379] *Catalog of Federal Domestic Assistance*, vol. 1, p. 58.

[380] Appendix to Subpart A.

[381] *Catalog of Federal Domestic Assistance*, vol. 1, p. 55.

[382] Appendix to Subpart A.

[383] *Catalog of Federal Domestic Assistance*, vol. 1, p. 55.

[384] Appendix to Subpart A.

[385] *Catalog of Federal Domestic Assistance*, vol. 1, p. 55.

[386] Appendix to Subpart A.

[387] Ibid.

[388] *Catalog of Federal Domestic Assistance*, vol. 1, p. 55.

[389] Appendix to Subpart A.

[390] Ibid.

[391] *Catalog of Federal Domestic Assistance*, vol. 1, p. 55.

[392] Appendix to Subpart A.

[393] Ibid.

[394] *Catalog of Federal Domestic Assistance*, vol. 1, p. 55.

## Organization, Budget, Staffing, and Workload of the FmHA Civil Rights Enforcement Function

### Organization and Responsibilities of EOS

FmHA's civil rights/equal employment opportunity (EEO) office is called the Equal Opportunity Staff (EOS). The EOS has both internal and external civil rights responsibilities.[395] The Director of the EOS reports directly to the Administrator who is the head of the agency (FmHA). However, under the recent USDA reorganization, the Director reports directly to the Under Secretary for Rural Economic and Community Development.[396]

EOS is located in FmHA's headquarters office in Washington, D.C. EOS is divided into two branches. The Equal Employment Opportunity Branch carries out FmHA's internal civil rights responsibilities. Currently, it has six staff members who are assigned to processing FmHA's internal Title VII/EEO complaints and two staff members who are assigned to special emphasis programs.[397]

The Equal Opportunity Program Compliance Branch (hereafter Program Compliance Branch) is responsible for external and internal civil rights enforcement, including Title VI, Title IX, the Age Discrimination Act, section 504 of the Rehabilitation Act, the Equal Credit Opportunity Act, and Title VIII of the Fair Housing Act. The Program Compliance Branch's primary responsibilities are to manage the processing of external program complaints, to respond to requests made by OCRE, and to monitor the program activities of the FmHA State, district, and county offices with respect to civil rights compliance. It also provides civil rights and compliance training to all field personnel.[398] Altogether, the Program Compliance Branch has nine staff members, including a branch chief, five equal opportunity specialists, three support staff, and two clerical staff.[399]

The organizational structure of EOS is adequate to ensure effective Title VI enforcement at the FmHA. The Director of EOS reports directly to the Administrator, giving him the necessary influence within the agency to ensure that Title VI enforcement is made an agency priority. Furthermore, within EOS, external and internal civil rights responsibilities are divided into two separate offices. This division should protect Title VI enforcement against any tendencies to let equal employment opportunity activities take priority over external civil rights activities. However, the agency also administers and has oversight responsibilities for federally conducted programs. FmHA stated that additional civil rights laws affect the agency programs, and, therefore, staffing is inadequate.[400]

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[395] *See* Carlton L. Lewis for Cheryl Prejean-Greaux, Acting Director, Equal Opportunity Staff, Farmers Home Administration, U.S. Department of Agriculture, memorandum to the U.S. Commission on Civil Rights, June 29, 1994, Q. 3, and attachment no. 2, "List of Major Civil Rights Laws Affecting the Delivery of FmHA Programs" (hereafter cited as Prejean-Greaux memorandum). With respect to federally assisted programs, in addition to Title VI, EOS is responsible for enforcing the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f (1988 & Supp. V 1993); the Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601–3619, 3631 (1988& Supp. V 1993); section 504 of the Rehabilitation Act of 1975, U.S.C. § 794 (1988 & Supp. V 1993); Title IX of the Education Amendment Act of 1972, 20 U.S.C. §§ 1681–1688 (1988); and Executive Order 11,246, 3 C.F.R. 339 (1964–1965), *reprinted in* 42 U.S.C. § 2000e (1988).

[396] USDA/FmHA Survey, Q. 20, p. 16.

[397] Cheryl Prejean-Greaux, Acting Director, Equal Opportunity Staff, Farmers Home Administration, U.S. Department of Agriculture, interview in Washington, D.C., June 22, 1994, pp. 1–2 (hereafter cited as Prejean-Greaux interview).

[398] Glickman letter, attachment, p. 8.

[399] Ibid. *See also* Prejean-Greaux interview, p. 1.

[400] Glickman letter, attachment, p. 8.

### FmHA State Offices

In addition to its EOS staff, FmHA has State civil rights coordinators/managers in each of its State offices in collateral-duty or full-time positions.[401] FmHA relies on its personnel to implement most of its day-to-day civil rights enforcement activities. EOS's primary role involves policy development, oversight, training, and complaint processing.[402] The State offices have both internal and external civil rights responsibilities. FmHA has no direct authority over these State office personnel, who report to FmHA's Associate Administrator.[403] This organizational structure is likely to impede FmHA's civil rights enforcement, because it does not give the civil rights office oversight over FmHA staff who conduct day-to-day civil rights enforcement activities.

The State directors have primary responsibility for administering a civil rights compliance program in their States.[404] They are assisted by designated staff, called "civil rights coordinators" or "civil rights mangers."[405] According to FmHA, the positions of State civil rights coordinators and managers "require extensive knowledge in the area of civil rights. These coordinators and managers serve as experts in civil rights enforcement and act as assistants to the State Directors, providing technical assistance in areas of nondiscrimination, civil rights, and equal opportunity related to FmHA programs and administrative activities."[406] The State civil rights managers and coordinators participated with State directors as key staff members in the planning, development, implementation, monitoring, and enforcement of all other civil rights laws and programs.[407] The State civil rights coordinators and managers also are responsible for coordinating their efforts to ensure uniform enforcement across the country.[408]

In 1987, EOS began permitting State offices to fill the State civil rights coordinator/manager positions with full-time and collateral-duty equal opportunity specialists.[409] Whether a State has a full-time civil rights manager depended on the State director's needs and the "amount of activity" within the State.[410] As of June 1994, 12 States had full-time civil rights managers[411] who spend 100 percent of their time on civil rights activities. However, the majority of States had assigned these duties only as a collateral assignment.[412] The Acting Director explained that the collateral-duty coordinators are "not giving 100 percent to civil rights. They give 20 percent of their time to civil rights activities."[413] She stressed that FmHA needs more full-time State civil rights managers for an effective field civil rights operation.[414] Without staff devoted full-time to civil rights enforcement, the FmHA State offices are likely to enforce Title VI ineffectively. Part-time staff cannot develop sufficient familiarity with civil rights statutes, including Title VI, to be able identify instances of noncompliance, which are often subtle and require considerable experience to recognize.

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[401] Glickman letter, attachment, p. 8.

[402] Ibid.

[403] Prejean-Greaux interview, p. 1.; USDA/FmHA Survey, attachment no. 1, Organization.

[404] USDA/FmHA Survey, attachment no. 1, Organization.

[405] Prejean-Greaux interview, p. 2. "Managers" are full-time civil rights staff, and "coordinators" are staff assigned civil rights responsibilities as a collateral duty. Ibid.

[406] Prejean-Greaux memorandum, Q. 6.

[407] Glickman letter, attachment, p. 9.

[408] USDA/FmHA Survey, attachment no. 1, Organization.

[409] Prejean-Greaux memorandum, attachment no. 3, "Position Management Review of State Civil Rights Coordinator Positions," p. 1.

[410] Glickman letter, attachment, p. 9.

[411] Prejean-Greaux memorandum, Q. 6. The States were Arkansas, California, Colorado, Michigan, Mississippi, New Mexico, North Carolina, South Carolina, Tennessee, Texas, Wisconsin, and Virginia.

[412] Prejean-Greaux memorandum, attachment no. 3, "Position Management Review of Civil Rights Coordinator Positions," p. 1.

### Budget, Staffing, and Workload of FmHA

FmHA has a separate budget allotment for EOS generally, and for Title VI enforcement, in particular.[415] Thus, FmHA can track its expenditures on Title VI and make informed decisions about resource allocation in comparison to workload.

FmHA's total civil rights budget increased from $3.3 million in 1988 to $10.1 million in 1993, but in 1994, it decreased to $7.7 million. The FmHA Title VI expenditures also rose over time, from $1.5 million in 1988 to $7.3 million in 1993.[416]

In June 1994, EOS had a total staff of 24, 10 of whom were assigned to the Program Compliance Branch, and 52 State civil rights coordinators/managers, of whom 12 were full-time.[417] Given that FmHA has responsibility five civil rights statutes in addition to Title VI, staffing for civil rights programs is inadequate.

FmHA reported that the civil rights workload of EOS and the State offices has grown over time because of downsizing in FmHA county and district offices and because of new civil rights regulations.[418] Furthermore, EOS has confronted an influx of new complaints.[419]

### USDA Reorganization

Under the USDA departmentwide reorganization, FmHA, the Rural Electrification Administration, and the Rural Development Administration have merged.[420] EOS expects to receive an additional 25 FTEs to serve the civil rights needs of the merged agency heads adequately. The additional FTEs will be assigned to the State directors.[421] The reorganization will evaluate the need to increase the number of full-time State civil rights coordinators[422] Since full-time civil rights managers are more effective, this change will improve FmHA's civil rights enforcement program.[423]

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[413] In its followup letter, FmHA indicated that collateral-duty officers give 10–50 percent of their time to civil rights activities. Glickman letter, attachment, p. 9.

[414] Prejean-Greaux interview, p. 3. Ms. Greaux also stressed the need for the State civil rights coordinators positions to be upgraded so they can interact effectively with the senior level State directors. Ibid.

[415] USDA/FmHA Survey, Q. 29, p. 20; Prejean-Greaux memorandum, attachment no. 8, response to USDA/FmHA Survey, Qs. 33, 34, pp. 23, 24.

[416] Prejean-Greaux memorandum, attachment no. 8, USDA/FmHA Survey, Qs. 33, 34, pp. 23, 24. The figure for 1994 is not available.

[417] Ibid., Qs. 4 and 5.

[418] USDA/FmHA Survey, Q. 28, p. 20.

[419] Prejean-Greaux interview, p. 5.

[420] Ibid., p. 3.

[421] Ibid.

[422] Glickman letter, attachment, p. 9. *See also* Prejean-Greaux interview, p. 3.

[423] Glickman letter, attachment, p. 9.

## Memorandum of Understanding Between the Rural Development Administration and the Farmers Home Administration

Under a memorandum of understanding with the Rural Development Administration, FmHA has taken on the responsibility of administering a civil rights program for, as well as providing other administrative services to, the Rural Development Administration on an interim basis. The Rural Development Agency, created in 1990, was to take over these functions gradually as it began to establish itself as an agency. Meanwhile, to ensure "continued service to the public and for protection of the Federal interests and rights," under the memorandum of understanding, FmHA has agreed to provide the "broad range" of services necessary for the Rural Development Administration to carry out its mandate, including civil rights enforcement.[424]

FmHA intended its civil rights budget to permit administration of a civil rights program encompassing both agency heads.[425] FmHA's EOS, FmHA State directors, and State civil rights coordinators/managers conduct compliance and monitoring activities for the Rural Development Administration.[426]

The Department of Justice requires FmHA and the Rural Development Administration to develop a joint, annual Civil Rights Implementation Plan. The Civil Rights Implementation Plan should provide an overview of their efforts to deliver federally assisted and conducted programs in a nondiscriminatory manner.[427]

Under the USDA departmental reorganization plan, which merges the Rural Development Administration and the FmHA, the memorandum of understanding and its provisions are nullified.[428]

## FmHA Instructions, Policies, Procedures, and Guidelines

In addition to USDA's Title VI regulations, FmHA implements its own civil rights instructions.[429]

### Instruction 1901–E

From the mid-1970s through 1994, FmHA has implemented Instruction 1901–E, entitled "Civil Rights Compliance Requirements," which was issued in 1975 and approved by the Department of Justice in 1976.[430]

Instruction 1901–E provides policies and procedures for FmHA implementation of the nondiscrimination requirements of Title VI and, in addition, Title VIII of the Civil Rights Act of 1968, Executive Order 11246, and the Equal Credit Opportunity Act of 1974.[431] The instruction specifically identifies all agency programs and activities covered by Title VI[432] and provides a detailed list of the prohibited forms of discrimination.[433] This list is identical to the list in USDA's Title VI regulations.

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[424] U.S. Department of Agriculture, Farmers Home Administration, Memorandum of Understanding with the Rural Development Administration, U.S. Department of Agriculture.

[425] U.S. Department of Agriculture, Farmers Home Administration and Rural Development Administration, "Plan for Administering Federal Assistance Programs and Activities for Fiscal Year 1993," p. 6 (hereafter cited as USDA/FmHA/RDA FY 1993 Implementation Plan).

[426] Ibid., pp. 5–6.

[427] Ibid., p. 1. Annually, Congress requires HUD and FmHA to submit an Annual Report "on Housing Beneficiaries." Glickman letter, attachment, p.9.

[428] *See* Prejean-Greaux interview, p. 2.

[429] U.S. Department of Agriculture, Farmers Home Administration, Chapter XVIII, Part 1901—Program-Related Instructions, Subpart E Civil Rights Compliance Requirements (Apr. 25, 1979) (hereafter cited as USDA/FmHA Instruction § 1901).

[430] *Id.* § 1901E.

[431] *Id.* § 1901E.201.

[432] *Id.* § 1901.204(a).

Instruction 1901-E outlines procedures for compliance reviews, but it does not cover pre-award reviews and gives little detail on complaint investigations. Although the instruction gives considerable detail on the process of conducting a compliance review, it does not address the standards used in the reviews. Furthermore, Instruction 1901-E does not contain procedures to address program managers and recipients' noncompliance with Title VI. For these procedures, FmHA uses USDA's Title VI regulations.[434]

As far back as 1980, the Department of Justice noted some problems with Instruction 1901-E. In an evaluation of Title VI enforcement at FmHA, the Department of Justice reported: "[The] Farmers Home [Administration] has not developed a compliance guideline or instruction which sets out the procedures and standards for determining the compliance posture of its funded projects. As a result, there is no useful instrument to structure an effective Title VI program."[435] FmHA recognized the problems with its instruction. According to its 1991–1994 Civil Rights Implementation Plan, "FmHA identifies major policy issues through legislation enacted by Congress. New laws and amendments to existing civil rights laws have a major impact on FmHA civil rights enforcement. We [FmHA] lack an up-to-date Agency civil rights regulation and are unable to apply new policies."[436]

### Draft Instruction 1940-D

In 1991, FmHA proposed to replace Instruction 1901-E with a new, revised instruction, 1940–D.[437] FmHA was developing the new instruction to bring its civil rights enforcement policies in line with laws and regulations not included in the previous instruction. Originally, the Program Compliance Branch of EOS proposed to complete revisions of the new instruction by December 1991 and to enforce the instruction by 1993.[438] In June 1994, the Acting Director of EOS said that the new instruction had been approved internally and was ready to be issued. However, EOS was awaiting passage of the departmental reorganization plan before implementing the draft instruction.[439] In October 1994, the Acting Director of EOS indicated that EOS was making changes to the draft instruction in response to final comments by the USDA Office of General Counsel. He also noted that the instruction would be forwarded to the Office of Management and Budget and to the U.S. Department of Justice for review and approval.[440]

Draft Instruction 1940-D covers, in addition to Title VI, the following civil rights laws: the Equal Opportunity Credit Act, Title VIII of the Civil Rights Act of 1968 (Fair Housing Amendments), as amended in 1988, the Age Discrimination Act of 1975, Title IX, and section 504 of the

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[433] *Id.* § 1901.202(a)(1).

[434] 7 C.F.R. Part 15; USDA/FmHA Survey, Qs. 57, 58, pp. 38, 39.

[435] U.S. Department of Justice, Office of Coordination and Review, Civil Rights Division, "Interagency Survey Report, Evaluation of Title VI Enforcement in the Farmers Home Administration of the U.S. Department of Agriculture" (November 1980), p. 54 (hereafter cited as DOC, "Evaluation of Title VI at FmHA").

[436] U.S. Department of Agriculture, Farmers Home Administration, "Fiscal Years 1991–1994 Civil Rights Implementation Plans," p. 9 (hereafter cited as USDA/FmHA FYs 1991–94 Implementation Plan).

[437] USDA/FmHA Survey, Q. 1, p. 5.

[438] USDA/FmHA FY 1992 Implementation Plan, p. 7.

[439] Prejean-Greaux interview, p. 3.

[440] Walter J. Dent, Acting Director, Equal Opportunity Staff, Farmers Home Administration, U.S. Department of Agriculture, letter to Frederick D. Isler, Acting Assistant Staff Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, Oct. 25, 1994, p. 1.

Rehabilitation Act of 1973.[441] Section 164 of the Instruction applies specifically to Title VI.[442]

Draft Instruction 1940-D improves on Instruction 1901-E by providing considerable detail on the obligations of FmHA's recipients. It requires State agencies administering continuing State programs to provide methods of administration that give reasonable assurance that the programs they administer will be in compliance with Title VI. Furthermore, the draft instruction requires applicants to furnish and recipients to maintain detailed data on the race and national origin of participants and beneficiaries of the FmHA programs they administer. It also requires recipients to take specific steps to disseminate information on Title VI to the public.[443]

Draft Instruction 1940-D specifically provides for preaward compliance reviews: "Preaward compliance reviews shall be made before a loan or grant has been approved or obligated. In addition, preaward compliance reviews shall be made before any loan or grant funds have been advanced to a recipient."[444] When an applicant has been found in noncompliance, that applicant may take voluntary action to comply. If there is no voluntary action, and if the agency has followed established procedures, FmHA can deny the requested assistance.[445]

The draft instruction requires the State civil rights coordinators to conduct periodic internal civil rights reviews of their operations and obligates State directors to take any necessary corrective actions.[446]

Finally, the draft instruction gives the State directors responsibility for maintaining the data necessary to prepare the Civil Rights Implementation Plans' workload and performance data section and for providing a written summary of the States' accomplishments each year, for inclusion in the implementation plan.[447]

However, the draft instruction, like the previous instruction, provides no information on the standards for compliance under Title VI and other civil rights laws.

## Interaction with the Office of Civil Rights Enforcement

EOS and OCRE do not work closely together. The Acting Director of EOS described the relationship as effective, but expressed a desire for closer contact with OCRE, in particular, for more oversight of EOS by OCRE. The only "required" contact between the two offices is that EOS must forward program complaints to OCRE for findings of compliance or noncompliance.[448] However, for most complaints, there is very little coordination between the two offices. EOS does coordinate with OCRE on "difficult discrimination cases," or cases with complex issues.[449]

The Acting Director of EOS told the Commission that the current civil rights structure at USDA (one umbrella civil rights office and individual agency civil rights offices) is adequate. However, she stressed that USDA's civil rights office should report directly to the Secretary of the USDA or the USDA should have an Assistant Secretary for Civil Rights at the Department.[450]

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[441] USDA/FmHA Draft Instruction 1940-D § 1940.151(a).

[442] *Id.* § 1940.164.

[443] *Id.* § 1940.164(f).

[444] *Id.* § 1940.176(f)(1).

[445] *Id.* § 1940.176(f)(4).

[446] *Id.* § 1940.182.

[447] *Id.* § 1940.179.

[448] Glickman letter, attachment, p. 10.

[449] USDA/FmHA FYs 1991–94 Implementation Plan, p. 7.

[450] Prejean-Greaux interview, p. 4.

She also said that more interaction between agency heads' civil rights offices and OCRE is necessary.[451]

## Process of Title VI Enforcement

As noted below, the State offices perform most of the day-to-day Title VI enforcement at FmHA, with the headquarters office primarily filling an oversight role.

### Preaward Reviews

FmHA Instruction 1901-E requires that the county supervisor, "at the time FmHA assistance is requested, give all applicants for loans and grants . . . a copy of Form FmHA 400–4, Nondiscrimination Agreement, and inform the applicant that assistance will be conditioned upon executing the form and complying with the requirements of [Title VI]."[452] However, it does not require FmHA to perform preaward reviews of applicants, although draft Instruction 1940-D does have such a requirement.[453]

At present, however, FmHA only performs preaward reviews for Water and Waste Facility loans and other utility-type projects[454] because once these projects begin, they cannot be stopped or corrected. In other words, there is a time element with those projects, while a housing project, for example, can be checked periodically for compliance.[455]

In 1988, FmHA awarded 20,000 federally assisted grants, loans, or contracts. The State civil rights coordinators performed 350 preaward desk-audit reviews during that year.[456]

FmHA does not conduct preaward reviews routinely because of limited resources. Thus, in many instances, FmHA is distributing Federal funds without adequate safeguards to ensure that its recipients are in compliance with Title VI. Although the draft Instruction 1940-D will require preaward reviews, EOS's limited resources will dictate that the State civil rights coordinators perform this task, while EOS oversees their efforts.[457]

### Postaward Reviews

FmHA does not perform postaward desk-audit reviews of its recipients. Thus, it is foregoing an cost-effective means of reviewing large numbers of its recipients for indications of noncompliance with Title VI.

Although FmHA does not perform desk-audit reviews, its State and district office personnel perform onsite "compliance" reviews of recipients. The EOS only receives copies of the compliance reports if there is a finding of noncompliance.[458] The EOS takes further action if there are "red flag" items that require explanation.[459]

FmHA State and district office personnel conduct postaward reviews within 90 days after the receipt of the last disbursement of loan or grant funds, or 90 days after loan closing, whichever comes first. These reviews involve onsite inspection, collection of data, examination of records, interviews with borrowers and program beneficiaries and community contacts.[460] FmHA State and district office personnel review approximately one-third of FmHA's recipients annually.[461] They conduct approximately 6,000 compliance reviews each year.[462]

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[451] Ibid.

[452] USDA/FmHA Instruction § 1901.202(d).

[453] USDA/FmHA Draft Instruction 1940D § 1940.176(f).

[454] USDA/FmHA FYs 1991–94 Implementation Plan, p. 6; Prejean-Greaux interview, p. 4.

[455] Prejean-Greaux interview, p. 4.

[456] USDA/FmHA Survey, Q. 41, p. 30. FmHA did not provide data on the number of preaward reviews conducted in later years.

[457] Ibid.

[458] Glickman letter, attachment, p. 10.

[459] Prejean-Greaux interview, p. 5.

The State civil rights coordinators do not perform these compliance reviews. They are required only to monitor the quality of the reviews.[463] Because trained civil rights specialists generally do not conduct the postaward reviews, the quality of the reviews may be inadequate. Moreover, the large volume of reviews performed annually also is likely to reflect a cursory, rather than thorough, review process.[464]

### Complaint Investigations

EOS staff perform complaint investigations, although OCRE makes the final determinations of compliance or noncompliance.[465]

In fiscal year 1991, FmHA received 160 discrimination complaints and carried over 134 unresolved complaints from the previous fiscal year, resulting in a total of 294 complaints. Of this number, FmHA transferred 43 cases to other agencies, found noncompliance in 8 cases, completed with findings of compliance in 37 cases, and closed 23 cases for lack of jurisdiction.[466] In fiscal year 1993, FmHA received 153 complaints and carried over 132 complaints from the previous year, for a total of 285 complaints.[467]

During fiscal year 1991, FmHA introduced its computerized tracking system to monitor the status of discrimination complaints on a daily basis. FmHA reported that the tracking system has worked well. However, the influx of new complaints has made it difficult for the tracking system to remain current for any length of time.[468]

### Deficiencies and Remedies

FmHA did not provide information on deficiencies it found or and did not explain how it resolved cases of noncompliance.

### Outreach and Education

FmHA's current instruction only requires that any borrower or grantee display the OCRE poster, "And Justice for All," at its facilities and/or office if it financed the facilities with a FmHA loan or grant and is subject to Title VI. All FmHA State, district, and county offices must display the poster.[469]

The Acting Director reiterated that the only required outreach is through the poster. She added that FmHA also uses notification in local newspapers and community involvement when new housing projects begin or when vacancies occur to ensure community awareness of the housing projects, water and sewer projects, and farmer programs funded by FmHA. She also reported that in 1994 a team of nine headquarters FmHA executives went to Mississippi to hear small farmers' concerns about program service delivery. According to her, over 100 predominantly minority community activists attended the outreach activity.[470]

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[460] USDA/FmHA FYs 1991–94 Implementation Plan, p. 7.

[461] USDA/FmHA Survey, Q. 61, p. 40.

[462] Ibid., Q. 63, p. 40.

[463] Glickman letter, attachment, p. 10. *See also* USDA/FmHA FYs 1991–94 Implementation Plan, p. 7.

[464] For instance, the U.S. Department of Education and the U.S. Department of Labor perform true civil rights compliance reviews. These are indepth, onsite reviews conducted by civil rights specialists. *See* chapter 5 and chapter 9.

[465] USDA/FmHA Survey, Q. 25(j), p. 19.

[466] USDA/FmHA Survey, Q. 25(j),(k), p. 19.

[467] USDA/FmHA FY 1993 Implementation Plan, Workload and Performance Data, p. 2.

[468] Ibid., p. 4.

[469] USDA/FmHA Instruction § 1901.202(f).

[470] Prejean-Greaux interview, p. 5.

### Technical Assistance

The State civil rights coordinators provide training to housing recipients.[471] During 1994 the Program Compliance Branch was scheduled to train 160 rural rental housing recipients and managers in Louisiana.[472] In addition, EOS provides technical assistance to FmHA recipients upon request.[473]

## EOS Oversight of the State Offices

EOS has responsibility for overseeing the compliance activities of the FmHA State and district offices.[474] FmHA monitors the effectiveness of its civil rights activities through the Coordinated Assessment Review (CAR), and departmental sponsored investigative reviews. As part of the CAR program, FmHA must review the State civil rights coordinators' activities.[475] The headquarters CAR program and administrative staff conduct State civil rights coordinators' assessment reviews to determine compliance with the program and with administrative and civil rights regulations. The CAR team makes onsite visits to projects receiving funds through FmHA. In fiscal year 1990, the compliance staff participated in seven CARs, in Utah, Louisiana, Illinois, Florida, Mississippi, Ohio, and Colorado.[476] In 1991 the compliance staff participated in 12 CARs, in Alabama, Florida, Georgia, Indiana, Iowa, Missouri, New Mexico, North Carolina, South Carolina, Tennessee, Oregon, and West Virginia.[477] They participated in a similar number of reviews during fiscal years 1992 and 1993.[478] All States are reviewed in a 3-year cycle.[479]

## Staff Training

All new EOS employees and State civil rights coordinators/managers must receive training in civil rights compliance.[480] The Program Compliance Branch of the EOS conducts approximately eight civil rights training sessions annually for State, district, and county office personnel.[481] It also provides training to FmHA and Rural Development Administration program staff.[482]

During 1991 the Program Compliance Branch conducted civil rights training in seven States for directors, assistant directors, and State civil rights coordinators.[483] In its 1992 Civil Rights Implementation Plan, FmHA reported that it planned to continue its policy of providing training and technical assistance to the State civil rights coordinators. The purpose of the training was to increase their knowledge and strengthen their position as field equal opportunity specialists. FmHA planned quarterly inservice training. It also indicated that it would continue to provide civil rights training sessions in support of State office operations and expand civil rights training to new State civil rights coordinators, district directors, and county supervisors and employees with collateral civil rights responsibilities.[484]

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[471] USDA/FmHA Survey, Q. 52, p. 36.

[472] Ibid., Q. 52, p. 36.

[473] Ibid., Q. 54, p. 37.

[474] Ibid., Q. 25(l),(m), p. 19.

[475] Ibid.

[476] USDA/FmHA FY 1991–1994 Implementation Plan, p. 7.

[477] USDA/FmHA FY 1992 Implementation Plan, p. 4.

[478] *See* USDA/FmHA FY 1993 Implementation Plan (no page numbers), USDA/FmHA FY 1994 Implementation Plan, p. 10.

[479] Prejean-Greaux interview, p. 5.

[480] USDA/FmHA Survey, Q. 49, p. 36.

[481] Glickman letter, attachment, p. 10.

[482] USDA/FmHA Survey, Q. 50, p. 36.

[483] USDA/FmHA FY 1992 Implementation Plan, p. 8.

The 1993 Civil Rights Implementation Plan indicates that EOS's training efforts were continuing during fiscal year 1992. EOS provided training on specific civil rights statutes, including Title VI. EOS was planning to train all employees on the new Instruction 1940-D upon implementation.[485]

## FmHA Reporting Requirements and Data Collection and Analysis

The current FmHA Instruction requires recipients to maintain, for review by FmHA and other appropriate agencies, racial and ethnic data on beneficiaries of FmHA-assisted programs.[486] EOS collects the data from recipients during compliance reviews. FmHA does not make comparisons of data on participants with data on the eligible population as a factor in determining a recipient's compliance or noncompliance.[487] Furthermore, FmHA does not require regular reporting of such data by its recipients, nor does it use data in postaward desk-audit reviews.[488] Thus, FmHA does not collect sufficient data from its recipients for effective Title VI enforcement. For instance, without more data from recipients, FmHA cannot make use of postaward desk-audit reviews, which are a cost-effective means of reviewing large numbers of recipients for Title VI compliance.

The draft FmHA Instruction 1940–D, when adopted, will improve significantly on FmHA's data collection efforts. In addition to data on program beneficiaries, draft Instruction 1940–D requires recipients to collect data on the population eligible for their programs. FmHA will look at these data to determine whether recipients' programs suffer from statistical underrepresentation of protected groups, and if so, to determine whether the recipients are in violation of Title VI. In addition, recipients will be required to report employment information, information on any governing boards, and the location of existing or proposed facilities, and to maintain demographic maps showing racial concentrations in their service areas.[489]

## Civil Rights Implementation Plans

The Commission reviewed FmHA's 1991–1994 base-year Civil Rights Implementation Plan, as well as Civil Rights Implementation Plans for the years 1992 and 1993. Generally, the plans do not fulfill the informational and management functions intended by the Department of Justice. They do not adequately explain how FmHA enforces Title VI and other civil rights statutes. Timetables and milestones for assessing achievement do not accompany the goals and objectives.

The 1991–1994 Civil Rights Implementation Plan included one long-range goal and four major objectives, as well as numerous short-term objectives. The long-range goal remained the same through the 1993 plan, with the major objectives changing slightly over time.[490]

The long-range goal is to develop a comprehensive outreach program to ensure that all qualified persons, particularly minority farmers, have access to FmHA programs.[491] The four major objectives include: 1) reducing the number of discrimination complaints by continued training of the State civil rights coordinators; 2) decreasing the backlog of unresolved complaints to 25 percent within 100 days and working closely with OCRE and the Department of Housing and Urban Development to resolve those complaints; 3) continuing efforts to increase the number of full-time civil rights specialists and to provide training to these specialists; and 4) finalizing and approving FmHA's proposed revised Instruction 1940–D.[492]

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[484] Ibid.

[485] USDA/FmHA/RDA FY 1993 Implementation Plan, p. 13.

[486] USDA/FmHA Instruction § 1901.202(g).

[487] USDA/FmHA Survey, Q. 62, p. 40.

[488] Ibid.

[489] USDA/FmHA Draft Instruction 1940–D, pp. 112–117.

[490] *See* USDA/FmHA FY 1991–1994 Implementation Plan, p. 11; USDA/FmHA FY 1992 Implementation Plan, section III (no page numbers); USDA/FmHA FY 1993 Implementation Plan, section III (no page numbers).

[491] USDA/FmHA FYs 1991–1994 Implementation Plan, p. 11.

The Civil Rights Implementation Plans reflect some of the problems that FmHA has had in Title VI enforcement. For example, the goals and objectives indicate that the current instructions are too general and need to be updated and strengthened, that minority farmers are not being reached by FmHA programs, and that FmHA civil rights specialists in the field need additional training and technical assistance. FmHA may be attempting to rectify these problems, but the plans do not indicate if and how they are accomplishing these objectives. The progress reports show that some strides are being made, but it is difficult to measure effectiveness without data on States' programs. The goals and objectives in the Civil Rights Implementation Plans suggest that FmHA has recognized problems in its Title VI enforcement programs and has tried to address these problems. However, they do not indicate that FmHA has made substantial progress towards solving its problems.

## Findings and Recommendations

### Organization, Budget, Staffing, and Workload

#### Organization

**Finding:** The internal organization of the office of Equal Opportunity Staff (EOS) adequately supports effective Title VI enforcement. The Director of EOS reports directly to the Farmers Home Administration's (FmHA) head, the Administrator. Although EOS has both internal and external civil rights responsibilities, these two functions are carried out by separate units within EOS, with separate supervisory staff. However, EOS does not have adequate control over all of FmHA staff performing Title VI enforcement activities. Most of the day-to-day enforcement activities are carried out by staff in FmHA State offices. These staff do not report to the Director of EOS.[493]

**Recommendation:** FmHA should change the structure of its civil rights enforcement. All staff engaged in Title VI enforcement activities, including those in FmHA State offices, should report to the Director of EOS.

**Finding:** Many of the FmHA State office staff conducting day-to-day Title VI enforcement functions for the agency perform these functions as a collateral duty and are not full-time equal opportunity specialists.[494]

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[492] Ibid., p. 11.

[493] *See* pp. 295–97.

[494] *See* pp. 296–97.

**Recommendation:** FmHA should require that each State office civil rights director be a full-time equal opportunity specialist.

### Budget, Staffing, and Workload

**Finding:** FmHA has the capability of tracking its Title VI expenditures separately from its expenditures on other civil rights activities. However, FmHA does not use this capability to support the development of a Title VI enforcement plan that would be based on a comparison of FmHA's resources and expenditures for Title VI activities and the work to be accomplished.[495]

**Recommendation:** FmHA should make use of its capability of tracking its Title VI expenditures separately from those on other civil rights activities to develop an annual Title VI enforcement plan. The enforcement plan should contain goals and objectives based on the work to be accomplished and the resources available for Title VI activities. Although the goals and objectives should all be targeted at achieving compliance with Title VI in all FmHA-funded programs, the goals and objectives should be framed in terms of specific tasks to be accomplished with specific timeframes for accomplishing them. The plan should specify which offices and which staff are responsible for achieving the goals and objectives.

**Finding:** EOS funding fell sharply in fiscal year 1994, but its civil rights workload continues to grow.[496]

**Recommendation:** EOS should use its information system to demonstrate that its budget is not sufficient for FmHA to enforce Title VI and other civil rights statutes effectively. In particular, EOS should document its increasing civil rights workload, determine the resources necessary for it to perform its duties adequately, and request for additional resources to make up any shortfall.

## Instructions, Policies, Procedures, and Guidelines

**Finding:** FmHA's current civil rights instruction, Instruction 1901, has several critical deficiencies. Specifically, it does not require preaward reviews of recipients, does not address standards for determining compliance with Title VI, and does not require recipients to collect and report data on the population eligible for their programs, in addition to data on their program participants. Several of these deficiencies would be corrected by draft Instruction 1940–D, currently undergoing review by USDA. However, the draft instruction does not include standards for determining compliance with Title VI.[497]

**Recommendation:** FmHA should move speedily to adopt draft Instruction 1940–D. In addition, FmHA should issue policy guidance clarifying standards for compliance with Title VI as it applies to FmHA-funded programs.

## Process of Title VI Enforcement

### Preaward Reviews

**Finding:** FmHA conducts preaward reviews for only one of its federally funded programs, the water and waste facility loan program. Thus, most FmHA funds are distributed without adequate safeguards to ensure that recipients are in compliance with Title VI. Although FmHA's new instruction will require such reviews, limited resources will dictate that the reviews be conducted by State office civil rights coordinators.[498]

**Recommendation:** FmHA should conduct desk-audit preaward reviews of all of its applicants, and onsite reviews for large or complex projects or where desk-audit reviews suggest that onsite investigation is warranted. If State office civil rights directors conduct these reviews, EOS staff need to review and evaluate their preaward review programs regularly.

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[495] *See* p. 297.

[496] *See* p. 297.

[497] *See* pp. 299–300.

[498] *See* p. 301.

### Postaward Desk-audit Reviews

**Finding:** FmHA does not conduct postaward desk-audit reviews of its recipients.[499]

**Recommendation:** FmHA should institute postaward desk-audit reviews of all recipients, to be supplemented with onsite reviews. EOS should develop procedures for such reviews, and State office civil rights personnel should conduct the reviews. The reviews should consist of a review and evaluation of information submitted to FmHA by the recipients in Title VI self-assessments or other regular reporting instruments. The information considered in the desk-audit reviews should include, but not be limited to, analysis of data on recipients' program participants, applicants, and the eligible populations for their programs.

### Onsite Compliance Reviews

**Finding:** Although FmHA conducts a large number of onsite compliance reviews each year, the reviews are conducted by State office program personnel and not the State civil rights coordinators. The reviews do not amount to indepth onsite compliance reviews such as those conducted by the U.S. Department of Education.[500]

**Recommendation:** The State civil rights coordinators should monitor the quality of the postaward reviews conducted by State program staff. They should provide regular training to State program staff about what to look for in a Title VI compliance review. In addition, State office civil rights coordinators should conduct indepth onsite reviews of selected recipients on an occasional basis. Recipients should be selected for review either because of indications that they may not be in compliance or to ensure that reviews are conducted of all types of recipients on a periodic basis. When these compliance reviews reveal instances of noncompliance that are likely to occur commonly among similar recipients, the State civil rights coordinators should share their letters of finding with the State program officers and provide them with additional training.

### Outreach and Education

**Finding:** FmHA does not require its recipients to conduct outreach and education beyond displaying a nondiscrimination poster. FmHA staff engage in some outreach and education activities, but these are not part of a systematic program of outreach and education.[501]

**Recommendation:** FmHA should include in its instructions a requirement that recipients provide adequate outreach and education on their programs and on Title VI as it relates to the programs. In addition to displaying a nondiscrimination poster, recipients should be required to make available informational brochures on their programs and Title VI. Where substantial segments of the population in a recipient's program area are limited English proficient, the information should be made available in languages other than English. In addition to these requirements of its recipients, EOS should develop a strategic plan for providing outreach and education on Title VI, as it relates to FmHA-funded programs, to recipients, program participants, intended beneficiaries, and the public. The plan should detail the relative responsibilities of EOS staff and State office civil rights and program staff.

### Technical Assistance

**Finding:** FmHA provides only limited technical assistance to its recipients.[502]

**Recommendation:** FmHA should ensure that it provides adequate technical assistance to its recipients. Technical assistance should be offered when preaward or postaward desk-audit reviews reveal compliance problems, during the course of onsite compliance reviews, whether they are conducted by State program personnel or by State civil rights directors. Technical assistance should also be provided proactively to all recipients when

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[499] *See* p. 301.

[500] *See* pp. 301–02.

[501] *See* pp. 302–03.

[502] *See* p. 303.

EOS or FmHA State coordinators determine that changing situations require it. For instance, if a new USDA or Department of Justice policy interpretation of Title VI affects the recipients' compliance obligations, FmHA should provide technical assistance to all recipients to assist them with complying with their obligations. Technical assistance also should be provided upon request.

### Staff Training

**Finding:** FmHA provides regular civil rights training to its civil rights staff, including the State office civil rights coordinators. However, FmHA does not provide civil rights training to State office program staff, who perform postaward reviews of recipients.[503]

**Recommendation:** FmHA should expand its existing civil rights training program to offer periodic civil rights training, including training on Title VI, to State office program personnel who perform postaward compliance reviews of FmHA recipients. The training should include information on the meaning of Title VI for FmHA's programs, the procedures for conducting compliance reviews, including the types of information that should be collected and analyzed during a review, and standards for determining compliance and noncompliance.

### Data Collection, Reporting Requirements, and Analysis

**Finding:** FmHA does not have an adequate system for collecting and analyzing data from its recipients. When draft Instruction 1940–D becomes final, FmHA will, for the first time, require recipients to submit the types of data necessary for FmHA to determine whether protected groups are underrepresented in FmHA-funded programs. Draft Instruction 1940-D also requires recipients to submit additional data that will be useful in evaluating their Title VI compliance status.

**Recommendation:** Once draft Instruction 1940–D becomes final, EOS should begin immediately to implement its data collection requirements. EOS should develop and offer training to State civil rights coordinators and State program personnel on the nature of the data requirements from recipients and on how to make use of the data to determine recipients' Title VI compliance status during preaward and postaward reviews of recipients. The State civil rights coordinators should review and analyze the data submitted by each FmHA applicant before funds are released. In addition, they should review and analyze the data submitted by the recipients on a regular basis. Finally, EOS should develop a data management and information system to allow it to analyze, in the aggregate, how well FmHA programs are serving protected groups, with a particular emphasis on determining whether members of protected groups face barriers that prevent them from having equal opportunity to participate in FmHA programs.

### Civil Rights Implementation Plans

**Finding:** FmHA's Civil Rights Implementation Plans do not conform to the requirements of the U.S. Department of Justice's "Guideline for Agency Implementation Plans Required by Executive Order 12,250, 'Leadership and Coordination on Nondiscrimination Laws.'"[504]

**Recommendation:** FmHA should develop its Civil Rights Implementation Plans in conformance with the Department of Justice guidelines. In particular, FmHA's Civil Rights Implementation Plans should provide a broad outline information on FmHA's Title VI enforcement program, including its scope, its organization, its budget and staffing, and the extent to which it conducts various civil rights activities. Furthermore, the plans should develop the goals and objectives section and the progress report section in accordance with the Department of Justice's mandate that the plans be used as a management tool by FmHA. Thus, goals and objectives should be precise, have specific timeframes for accomplishing them, and be based on a realistic assessment of budget and staff resources available for civil rights enforcement.

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[503] *See* pp. 303–04.

[504] *See* pp. 304–05.

## Soil Conservation Service

The Soil Conservation Service (SCS) is responsible for developing and carrying out a national soil and water conservation program. SCS also assists in agricultural pollution control, environmental improvement, and rural community development. Several States target assistance to limited resource farmers, including women and individuals with handicaps.[505]

## The SCS Federally Assisted Programs

SCS administers seven major federally assisted programs. These programs provide funds for technical assistance to land users, watershed protection and flood prevention, and for resource conservation and development.[506] It awards nearly $800 million in Federal financial assistance annually to approximately 4,000 recipients.[507]

The SCS-administered financial assistance programs are:

- *Conservation technical assistance* provides advisory services and counseling to the public and State and local governments in the area of soil and water conservation.[508]

- The *plant materials center program* provides specialized services to help promote the commercial use of new and improved plant materials for environmental improvement.[509]

- The *watershed and flood prevention operations* provides technical and financial assistance to State agencies, local governmental entities, and other nonprofit entities for works of improvement to protect land and water resources in small watersheds.[510]

- The *soil survey* maintains and provides to interested parties up-to-date soil surveys of counties and other similar areas.[511]

- The *rural abandoned mine program* provides assistance to entities that own or control the surface or water rights of abandoned coal lands or water affected by coal mining for projects that protect people and the environment from the adverse effects of past coal mining and promote development of unreclaimed coal lands.[512]

- The *resource conservation and development* program provides grants to State and local governments and nonprofit organizations for resource conservation and development projects.[513]

- The *Great Plains conservation program* provides technical and financial assistance for landowners or operators in the Great Plains

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[505] U.S. Department of Agriculture, Soil Conservation Service, "Fiscal Year 1990 Civil Rights Implementation Plan," p. 6. (hereafter cited as USDA/SCS FY 1990 Implementation Plan).

[506] Ibid., pp. 2–3.

[507] U.S. Department of Agriculture, Soil Conservation Service, "Fiscal Year 1992 Civil Rights Implementation Plan," Attachment O, p. 10 (hereafter cited as USDA/SCS FY 1992 Implementation Plan); U.S. Department of Agriculture, "Fiscal Year 1993 Civil Rights Implementation Plan," Attachment O, p. 10 (hereafter cited as USDA/SCS FY 1993 Implementation Plan; U.S. Commission on Civil Rights, *Survey of Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Agriculture, Soil Conservation Service, Qs. 41(b),(d), p. 30 (hereafter cited as USDA/SCS Survey).

[508] *Catalog of Federal Domestic Assistance*, vol. 1, p. 114.

[509] Ibid., p. 116.

[510] Ibid., p. 115.

[511] Ibid., p. 114.

[512] Ibid., p. 118.

[513] Ibid., pp. 112–3.

States for soil and water conservation aimed at stabilizing a farm or ranch against climatic and erosion hazards.[514]

## Organization, Budget, Staffing, and Workload of the SCS Civil Rights Enforcement Function

### Organization

The primary civil rights office at SCS is its Civil Rights and Program Compliance Division (CR&PCD).[515] According to the SCS fiscal year 1990 Civil Rights Implementation Plan, "the overall mission of SCS's civil rights program is to provide national leadership in planning, developing, and implementing the intent of nondiscrimination laws and the USDA's equal opportunity policy that have implications for the conservation and use of soil, water and related resources, and improves those resources. This broad mission is designed to ensure that equal opportunity is an integral part of the cooperative effort and that all conservation programs are available to all land users without regard to race, color, national origin, religion, sex, age and handicap."[516]

CR&PCD has responsibility for external civil rights enforcement, but currently does not engage in internal civil rights activities.[517] In addition to Title VI, CR&PCD is responsible for enforcing the following civil rights statutes: section 504 of the Rehabilitation Act of 1973;[518] Title IX of the Education Amendments of 1972;[519] the Age Discrimination Act of 1975;[520] the Civil Rights Restoration Act of 1987;[521] Title II of the Americans with Disabilities Act (ADA);[522] and all other departmental regulations, guidelines, and Executive orders that affect SCS in enforcing equal opportunity in program delivery.[523]

The Director of CR&PCD develops and coordinates civil rights policy for SCS and advises the Chief of SCS on all matters that relate to civil rights compliance.[524] Until July 1994, the Director of CR&PCD reported to the Deputy Chief for Programs who reports to the Chief of SCS.[525] The Director of CR&PCD acknowledged that this line of authority has not always been "compatible" with civil rights enforcement at SCS but maintained that it has not hindered him in carrying out his responsibilities. He has always advised the Chief of SCS, both formally and informally on civil rights issues. In some instances his advice became the impetus for policy changes in civil rights. However, he said that his degree of access to and the responsiveness to his advice has depended on the particular Deputy Chief for Programs and Chief of SCS. In most cases, he must wait for the Chief of SCS to initiate contact with him. The frequency of contact has depended on the "importance" of civil rights to the Chief. He indicated that he had good access to the present Chief.[526]

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[514] Ibid., p. 112.

[515] USDA/SCS FY 1993 Implementation Plan, p. 1; USDA/SCS Survey, Qs. 20, 25, pp. 16, 18. During 1992, SCS's Civil Rights Division became the Civil Rights and Program Compliance Division. Ibid.

[516] USDA/SCS FY 1990 Implementation Plan, p. 1.

[517] USDA/SCS Survey, Appendix I.

[518] 29 U.S.C. § 794 (1988 & Supp. V 1993).

[519] 20 U.S.C. §§ 1681–1688 (1988).

[520] 42 U.S.C. §§ 6101–6107 (1988).

[521] Pub. L. No. 100–259, 102 Stat. 28 (codified as amended at 20 U.S.C. §§ 1681note, 1687, 1687note, 1688, 1688note (1988); 29 U.S.C. §§ 706, 794 (1988 & Supp. V 1993); 42 U.S.C. §§ 2000d–4a, 6107 (1988)).

[522] 42 U.S.C. §§ 12,131–12,165 (Supp. V 1993).

[523] USDA/SCS Survey, Appendix I.

[524] U.S. Department of Agriculture, Soil Conservation Service, *General Manual 230*—Part 405, "Equal Opportunity in Program Delivery," § 405.3(k) (hereafter cited as USDA/SCS, *General Manual 230*).

[525] Dr. Arun Basu, Director, Civil Rights and Program Compliance Division, Soil Conservation Service, interview, in Washington, D.C., June 30, 1994 (hereafter cited as Basu interview), documents provided, document no. 3, "Organizational Chart," June 20, 1994 (hereafter cited as USDA/SCS Organizational Chart).

In June 1994, all five staff persons in CR&PCD were assigned to external civil rights enforcement, including the Director, a secretary, and three FTEs who are equal opportunity specialists. Since 1986 there have been no more than six slots in CR&PCD.[527] These staff develop Title VI policy and procedures; review all program guidelines; provide training and technical assistance; collect and analyze race, sex, and ethnic data; and monitor the activities of the SCS State conservationists.[528]

CR&PCD has no regional offices or staff. However, SCS has a State conservationist in each State who is responsible for civil rights enforcement.[529] The State conservationist directs and coordinates civil rights compliance activities and provides information to the Director of CR&PCD.[530] The State conservationists do not report to CR&PCD but to the Assistant Chief for their region (SCS has four regions), who in turn reports to the Associate Chief and Chief of SCS.[531]

In addition to the State conservationist, each State office has a collateral-duty equal opportunity liaison officer assigned to civil rights compliance activities. The liaison officers report to the State conservationists. They perform Title VI compliance activities, along with SCS district conservationists.[532] These officials work closely with program recipients and are responsible for the dissemination of SCS program information and responsibilities. They perform all SCS's preaward reviews.[533] According to the Director of CR&PCD, there is no particular amount of time they are required to allocate to Title VI.[534] Furthermore, CR&PCD does not participate in the selection of liaison officers or district conservationists.[535]

The organizational structure of civil rights enforcement at SCS facilitates Title VI enforcement by maintaining separate offices for internal and external civil rights enforcement. However, the office charged with Title VI enforcement does not have sufficiently high status within SCS to ensure that its Director will be able to influence crucial agency decisions, such as decisions about budgets. Although the Director of CR&PCD currently has good access to the agency administrator, there is no guarantee, given the low status of the position, that this situation would continue under another administrator. A second problem with SCS's organizational structure is that State conservationists do not report to the Director of CR&PCD. As a result, there is no guarantee that civil rights enforcement will be conducted throughout the agency in a consistent manner or that crucial enforcement decisions will be made by the civil rights office.

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[526] Basu interview, pp. 1–2.

[527] Ibid, p. 1.

[528] USDA/SCS Survey, Q. 25, pp. 18–19.

[529] Basu interview, p. 1.

[530] USDA/SCS *General Manual 230*, § 405.8.

[531] USDA/SCS Organizational Chart.

[532] Ibid. The district conservationists report to area conservationists, who in turn report to the State conservationists. Ibid.

[533] Basu interview, p. 3.

[534] Ibid.

[535] Ibid.

### Budget, Staffing, and Workload of the Civil Rights and Program Compliance Division

SCS does not have a separate budgeta allotment for CR&PCD and no separate amount designated for Title VI enforcement.[536] As a result, it cannot track its expenditures on Title VI, nor can it use this information in agency planning.

SCS's overall civil rights funding has increased from $248,000 in fiscal year 1988, to $356,000 in fiscal year 1993, and $377,000 in fiscal year 1994.[537] Although SCS reported 13,801 total agency federally assisted programs staff in 1993, CR&PCD has only 5 full-time staff.[538] In addition, SCS had 52 State conservationists and 56 collateral-duty equal opportunity liaison officers.[539]

According to the SCS survey response, "[t]he workload is heavy, and at times it gets frustrating."[540] SCS reported that the five CR&PCD staff members have faced difficulties carrying out the overall responsibility of Title VI monitoring and enforcement.[541]

### SCS Reorganization

The USDA reorganization changed the name of the SCS to the Natural Resources Conservation Service, which will fall under the Assistant Secretary for Natural Resources and Environment.[542] Although Congress had not yet approved the USDA reorganization plan, SCS's "internal" reorganization became effective in July 1994.[543] Under the internal agency reorganization, the Director of CR&PCD now reports to the Deputy Chief of Management.[544] However, the new assignment is unlikely to have any real impact on civil rights at the agency, or on CR&PCD's role and responsibilities. The USDA considers it a "consolidation of related activities."[545]

Under the SCS reorganization, CR&PCD will have responsibility for the enforcement of both Title VI and Title VII/EEO internal civil rights programs. Before the reorganization, the Office of Human Resources performed the Title VII/EEO function.[546] Although internal and external civil rights enforcement both will be housed in CR&PCD, they will have different staff assigned to them and will not have "overlapping" functions. CR&PCD will have 10 staff members, including the Director and a secretary, 4 FTEs assigned to Title VI, and 4 FTEs assigned to Title VII/EEO. The staff assigned to Title VII/EEO will be transferred to CR&PCD from the Office of Human Resources.[547]

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[536] USDA/SCS Survey, Q. 29, p. 20.

[537] Dr. Arun C. Basu, Director, Civil Rights and Program Compliance Division, Soil Conservation Service, U.S. Department of Agriculture, letter to Frederick D. Isler, Acting Assistant Staff Director, Office for Civil Rights Evaluation, U.S. Commission on Civil Rights, July 7, 1994 (hereafter cited as Basu letter).

[538] USDA/SCS Survey, Q. 35, p. 25.

[539] Ibid.

[540] Ibid., Q. 27, p. 20.

[541] USDA/SCS Survey, Q. 28, p. 20.

[542] Basu letter, p. 1. *See also Team USDA Summary*, p. 3.

[543] Basu interview. The agency head has authority to reorganize its divisions internally. *See* Carrie Wetsch, Equal Opportunity Specialist, Civil Rights and Program Compliance Division, Soil Conservation Service, U.S. Department of Agriculture, comments on Basu interview report, July 14, 1994 (hereafter cited as Wetsch comments).

[544] Paul W. Johnson, Chief, Soil Conservation Service, U.S. Department of Agriculture, memorandum through James R. Lyons, Assistant Secretary, Natural Resources and Environment, U.S. Department of Agriculture, to Evelyn R. White, Director, Office of Personnel, U.S. Department of Agriculture, "Organizational Changes," July 1, 1994 (hereafter cited as USDA/SCS, "Organizational Changes").

[545] Basu interview, p. 2.

[546] Ibid. *See also*, USDA/SCS, "Organizational Changes."

The Director of CR&PCD does not foresee much of a change in Title VI enforcement as a result of the internal reorganization. However, he does not know what resources he will be allocated to carry out the Division's old and new civil rights responsibilities.[548]

The reorganization transferred internal civil rights responsibilities to SCS's civil rights office, creating the potential that external civil rights, including Title VI enforcement, will deteriorate at the expense of internal equal employment opportunity concerns. This potential problem has been made less likely because the internal and external civil rights activities will be conducted by separate entities within the new civil rights office. However, until the staff sizes of these two entities becomes known, the possibility that resources for Title VI enforcement will be reduced remains.

## The General Manual, Policies, Procedures, and Guidelines

In addition to the USDA regulations and Departmental Regulation 4300-1, CR&PCD implements SCS's *General Manual 230*, Part 405, which is the agency's instruction covering its civil rights policies, programs, authority, compliance reviews and other procedures, and guidelines.[549]

SCS issued the General Manual in 1987. SCS indicated that the Department of Justice has not approved the manual because SCS has never "been asked" by the Department of Justice to have it approved.[550] SCS has revised the manual three times since it was originally approved by the SCS Chief, and none of the revisions has been approved by the Department of Justice.[551] The Director of CR&PCD was "perplexed" that the Department of Justice had not yet approved SCS's General Manual. The Department of Justice did request a copy of the manual in 1990, as an attachment to the 1991 Civil Rights Implementation Plan. However, although it was submitted, the Department of Justice never commented on it nor did the Department ask for any additional information.[552]

The manual describes the relative responsibilities of the Chief of SCS, the Director of CR&PCD, and the State conservationists for ensuring equal opportunity in program delivery.[553] It provides detailed instructions on the obligations of SCS offices to notify the public of its rights under Title VI and other civil rights statutes[554] and charges each SCS program office with collecting and reporting participation and eligibility data for their programs by race, ethnicity, and gender. SCS must examine the data to identify disparities in the delivery of program benefits.[555] The manual requires SCS to conduct onsite compliance reviews and gives instructions on the frequency of reviews and methods of selecting recipients for review.[556] It also contains procedures for handling complaints.[557] It lists the forms of discrimination that are prohibited[558] but does not provide detailed standards for compliance. Finally, the manual emphasizes the responsibility of SCS to provide comprehensive civil rights training to its employees.[559]

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[547] Basu interview, p. 2.

[548] Ibid., pp. 2–3.

[549] USDA/SCS, *General Manual 230*—Part 405, "Equal Opportunity in Program Delivery"; and USDA/SCS Survey, Qs. 1 & 4, pp. 5–6.

[550] USDA/SCS Survey, Q. 2, p. 5.

[551] Carrie Wetsch, Equal Opportunity Specialist, Civil Rights and Compliance Division, Soil Conservation Service, interview in Washington, D.C., June 30, 1994. The General Manual was updated on February 27, 1991, to incorporate policies protecting the interest of disabled beneficiaries as required by the Department of Justice. It also includes revision to clarify the role of program managers and the State equal opportunity committee relative to program delivery. USDA/SCS, *General Manual 230*—Part 405, Subparts A and B, as amended, Feb. 27, 1991.

[552] Ibid.

[553] USDA/SCS, *General Manual 230*, § 405.4.

[554] *Id.* § 405.5.

[555] *Id.* § 405.6.

### Interaction with the Office of Civil Rights Enforcement

There is minimal interaction between SCS and OCRE. The two offices interact when an SCS complaint cannot be resolved voluntarily. The interaction occurs between the two offices, for the most part, when CR&PCD submits complaints for processing or when it receives directives. OCRE controls the interaction between CR&PCD. It communicates its directives to CR&PCD, but it will not respond to CR&PCD's requests. For example, in the past, CR&PCD requested OCRE to provide guidance or clarification on civil rights issues; however, the Director never received a response.[560]

### Process of Title VI Enforcement

The State conservationists and their equal opportunity liaison officers, in conjunction with the district conservationists, are responsible for all Title VI field activities, including preaward reviews. Except for policy development and complaint processing, the role of CR&PCD is limited to monitoring the State conservationists to ensure that they are carrying out these responsibilities.

#### Preaward Reviews

SCS requires various types of assurances of nondiscrimination from its recipients. SCS required some of the assurances from recipients, and others were imposed by the Department of Agriculture. Thus, some of the assurances are "very political." Furthermore, some assurances date back to the 1960s when there were no antidiscrimination clauses.[561]

The SCS General Manual does not contain procedures for conducting preaward reviews.[562] However, the district conservationists conduct preaward reviews to ensure that recipients of SCS-assisted programs are complying with the law.[563] The district conservationists perform approximately 3,000 preaward reviews annually. They report their findings to the State conservationists, who report in turn to CR&PCD.[564]

The absence of preaward instructions in the SCS General Manual and the large number of preaward reviews SCS conducts each year together suggest that SCS's preaward reviews are little more than reviews to ensure that required assurances of nondiscrimination have been submitted. Without a more comprehensive preaward review, SCS has no mechanism to ensure that SCS funding is not allocated to recipients in violation of Title VI.

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[556] *Id.* § 405.8.

[557] *Id.* § 405.9.

[558] *Id.* § 405.10.

[559] *Id.* § 405.11.

[560] Basu interview, p. 5.

[561] Ibid., p. 4; Wetsch comments. According to Ms. Wetsch, assurances dating back to the 1960s were between the Secretary and the Soil Conservation Districts that were recipients. Those assurances were reviewed by CR&PCD until October 1993, when SCS and the Office of General Counsel agreed that if a supplemental memorandum of understanding (MOU) between the State conservationist and the State conservation districts has been updated to include appropriate nondiscrimination language, the MOU between and the Secretary and the State conservation districts did not have to be updated. CR&PCD uses assurances to determine compliance/noncompliance. *See also* U.S. Department of Agriculture, Soil Conservation Service, *General Manual 180*, Amendment 12 [Part 401].

[562] USDA/SCS, *General Manual 230*.

[563] USDA/SCS FY 1990 Implementation Plan, p. 17.

[564] Basu interview, p. 3.

### Postaward Reviews

In contrast to its cursory preaward reviews, SCS has an active postaward review program. The SCS General Manual requires State conservationists to conduct reviews every 3 to 5 years of the SCS area, field, and project offices and their recipients to ensure that SCS programs are in compliance with Title VI and other civil rights statutes.[565] In fiscal year 1993, the equal opportunity liaison officers in the State conservationists' offices conducted 554 postaward compliance reviews. Of these, 442 resulted in findings of compliance and 112 resulted in findings of noncompliance. All 112 recipients found in noncompliance agreed in writing to remedy the noncompliance. None involved discriminatory practices.[566]

### Investigation of Complaints

CR&PCD investigates all complaints pertaining to SCS-funded programs.[567] In 1993, SCS received one Title VI complaint.[568] The lack of Title VI complaints is a strong indication that SCS conducts inadequate outreach and education on Title VI.[569]

### Deficiencies and Remedies

If CR&PCD finds noncompliance in a program, it will request that the recipient send a corrective action plan. However, there has never been such a case, because most problems are resolved before the complaint process is conducted.[570]

### Outreach and Education

The SCS General Manual has detailed public notification procedures.[571] It requires each SCS office that provides assistance or has public contact "to take positive and specific actions to advise all constituent groups of the agency's and USDA's policy of nondiscrimination and of the procedures for filing a compliant."[572] Specific requirements include:

1) Prominent display of the USDA's poster, "And Justice for All";

2) Mailing lists of potential beneficiaries that are coded by race and sex;

3) The use of informational mailings to grassroots organizations and other informational sources that are commonly used by minorities, the disabled, and women;

4) Information availability in languages other than English;

5) A prominent nondiscrimination statement in all general informational materials on SCS programs;

6) Inclusion of persons of all races, sexes, and national origins in all graphic/photographic material displayed by recipients and program offices;

7) Development and use of a master list of local nonminority, minority, disabled, and women's media; and

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[565] USDA/SCS, *General Manual 230*, § 405.8.

[566] USDA/SCS Survey, Q. 68, pp. 44–45.

[567] Ibid., Q. 25(j),(k), p. 19.

[568] Ibid., Q. 71, p. 46.

[569] SCS maintains that the low number of Title VI complaints is a strong indication that SCS uses intervention and prevention strategies in conducting its compliance activities. Glickman letter, attachment, p. 11.

[570] Basu interview, p. 4.

[571] USDA/SCS, *General Manual 230*, § 405.5.

[572] *Id.* § 405.5(a).

8) A policy of not participating in meetings of groups that discriminate.[573]

SCS publicizes the name of the CR&PCD Director through its General Manual, its Director, memoranda, and personal contacts.[574] It also advertises program information through assurance statements in all news releases, educational materials, publications, and slide presentations.[575]

CR&PCD disseminates information in various non-English languages such as Spanish, Vietnamese, Chinese, Korean, Filipino, Hawaiian, Punjabi, and Hmong.[576] The State conservationists usually request publications in the different languages. In response to such requests, for example, CR&PCD provided funds to Puerto Rico to develop publications in Spanish. In Hawaii, the State conservationist requested guidelines and publications in Chinese, Korean, and Japanese. Most of these non-English language requests were from southern California, Puerto Rico, Colorado, Hawaii, New Mexico, Texas, Arizona, and Florida, areas with very high Hispanic and Asian American populations.[577]

When a request is made for information in a non-English language, CR&PCD tries to respond immediately. CR&PCD responded to Puerto Rico's request in 60–90 days, and to Hawaii's request in 30 days. The Director of CR&PCD indicated that the outreach in various ethnic languages was one of his "best accomplishments" as director of civil rights at SCS.[578]

Other means of outreach include extensive use of the rȧdio in the field. SCS has an annual project with African American farmers in Fargo, Arkansas, that involves 10 youths who learn about soil conservation and farming.[579]

In its 1994 Civil Rights Implementation Plan, CR&PCD reports on some of the outreach and education activities it conducted during 1993. For example, the Division identified "grass roots" organizations, including Women Involved in Farm Economics and the National Association of Conservation District Auxiliary, to strengthen its program outreach and initiatives.[580]

Thus, CR&PCD has taken substantial steps to inform the public about its rights under Title VI. However, given that SCS receives almost no Title VI complaints, CR&PCD's current level of outreach and education activity may be insufficient.[581]

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[573] *Id.* § 405.5(b).

[574] USDA/SCS Survey, Q. 48, p. 35.

[575] Ibid., Q. 46, p. 35.

[576] Ibid., Q. 47, p. 35.

[577] Basu interview. *See also* U.S. Department of Agriculture, Soil Conservation Service, "Soil Conservation Service Translation Project," translation of "Conservation Practice Information Sheet" from English to Korean by Kwon Kim, Jan. 13, 1994.

[578] Basu interview, p. 6.

[579] Ibid. *See also* Ronnie D. Murphy, Arkansas State Conservationist, Soil Conservation Service, U.S. Department of Agriculture, memorandum to William Richards, Chief, Soil Conservation Service, U.S. Commission on Civil Rights, "EOP—RCA Special Studies," Mar. 5, 1992.

[580] Arun C. Basu, Director, Civil Rights and Program Compliance Division, Soil Conservation Service, U.S. Department of Agriculture, memorandum to State Conservationists, Directors, Caribbean and Pacific Basin Areas, National Technical Center Directors, Headquarters Division Directors, and Above, "EOP—Soil Conservation Service (SCS) Fiscal Year (FY) 1994 Civil Rights Implementation Plan (CRIP) Update (hereafter cited as Basu memorandum on USDA/SCS FY 1994 Implementation Plan).

### Technical Assistance

CR&PCD provides technical assistance to State and local agency staff both upon request and at its own initiative.[582] CR&PCD provides technical assistance to recipients only upon request, usually one to two times a year.[583] During 1993, CR&PCD provided technical assistance and civil rights training in six States. The participants included a total of 171 program managers and supervisors, and 20 officials from local and regional recipient groups.[584] In 1993 the Director of CR&PCD conducted two training seminars for recipients on their role in ensuring equity in program delivery.[585]

## CR&PCD Oversight of State Conservationists

CR&PCD has minimal contact with the district conservationists. CR&PCD's contact with field staff consists mainly of telephone calls and letters from the State conservationists.[586] According to the Director of CR&PCD, his staff may have personal contact with approximately 15 State conservationists a year. Usually, the State conservationists will initiate that contact. The State conservationists must provide annual reports to CR&PCD on State activities. CR&PCD staff use the information for the development of the Civil Rights Implementation Plan.[587] If CR&PCD identifies problems in the report, it notifies the State conservationist and recommends corrective action. If a complaint is filed, CR&PCD sends it to OCRE.[588]

SCS's primary means of monitoring the States is through postaward onsite compliance reviews. In preparing for a State compliance review and determining what field offices States will review, CR&PCD reviews agricultural and population data, information on file regarding the State, and previous program compliance reviews.[589] It also considers civil rights training, plans of operations, assurances and/or contractual agreements (preaward reviews), public notification, compliance reviews conducted within the State (postaward reviews), program participation data, and handicap accessibility.[590] In conducting the reviews, CR&PCD staff interviews the field staff and chairpersons of recipient groups to ensure that they know their responsibilities in conducting compliance reviews.[591] This "top to bottom" review takes approximately 3 to 4 months.[592]

CR&PCD conducts oversight reviews of States on a 5-year cycle, and States conduct reviews of field offices on a 3- to 5-year cycle, or roughly 10 reviews each year. CR&PCD has reviewed all States during the past 5 years.[593]

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[581] SCS maintains that the low number of Title VI complaints is a strong indication that SCS uses intervention and prevention strategies in conducting its compliance activities. Glickman letter, attachment, p. 11.

[582] USDA/SCS Survey, Q. 53, p. 37.

[583] Ibid., Q. 54, p. 37.

[584] Basu memorandum on USDA/SCS FY 1994 Implementation Plan.

[585] USDA/SCS Survey, Q. 52, p. 36.

[586] Basu interview, p. 3.

[587] Ibid.

[588] Ibid.

[589] Wetsch comments, p. 1.

[590] Ibid., attachments nos. 1, 2.

[591] Ibid., attachment no. 1.

[592] Basu interview, p. 4.

During fiscal year 1991, CR&PCD conducted compliance reviews in 10 States. All 10 demonstrated problems with their assurances, and over one-half had problems with civil rights training and public notification of their Title VI programs.[594] In fiscal year 1992, CR&PCD conducted compliance reviews in nine States. Over one-half of the reviews showed problems with assurances, compliance reviews, program participation data and accessibility requirements.[595] During fiscal year 1993, CR&PCD conducted 44 onsite civil rights compliance reviews in eight States. When CR&PCD discovered noncompliance, States submitted corrective plans and took voluntary action or planned to correct the noncompliance.[596]

In 1993, CR&PCD conducted an onsite review of South Carolina.[597] The purpose of the review was to evaluate the effectiveness of SCS's civil rights compliance in program delivery in South Carolina; assess civil rights program compliance activities; determine the extent to which managers, supervisors, and employees understand their responsibilities and are involved in compliance activities; and identify programmatic deficiencies and barriers to compliance and provide technical assistance and guidance in eliminating deficiencies and resolving issues associated with the development and implementation of civil rights compliance.[598] The appraisal was conducted by reviewing records, interviewing SCS staff assigned responsibilities in the program areas, and by visiting selected field offices to discuss various program activities.[599] The review found that a "variety of handicap accessibility and related problems" existed in some parts of the State, "amounting to a substantial noncompliance status."[600] The review resulted in recommendations that appropriate instructions and training be provided to civil rights program appraisal staff to ensure objective evaluation of participation data[601] and that planned outreach efforts extend program benefits equally to minorities and females.[602]

Thus, CR&PCD although relies heavily on State conservationists to conduct day-to-day enforcement activities, CR&PCD has in place and actively implements an effective system for monitoring the State conservationists' Title VI enforcement.

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[593] Wetsch comments, attachment no. 1.

[594] USDA/SCS Survey, Q. 67, p. 43. *See* USDA/SCS Survey, documents submitted with the Survey, Appendix V, "Civil Rights Program Compliance Reviews, Fiscal Years 1991–1992 Findings of Noncompliance" (hereafter cited as USDA/SCS, "Civil Rights Program Compliance Reviews, Fiscal Years 1991–1992 Findings of Noncompliance").

[595] USDA/SCS Survey, Q. 67, p. 43. USDA/SCS, "Civil Rights Program Compliance Reviews, Fiscal Years 1991–1992 Findings of Non Compliance." *See also* Arun C. Basu, Director, Civil Rights and Program Compliance Division, Soil Conservation Service, U.S. Department of Agriculture, memorandum to State conservationists, Directors, Caribbean and Pacific Basin Areas, National Technical Center Directors, Headquarters Division Directors, and Above, "EOP—Summary of FY 1992 Civil Rights Compliance Review Findings," Nov. 16, 1992.

[596] Basu letter, p. 2.

[597] USDA/SCS Survey, Q. 64, p. 41. *See* USDA/SCS Survey, documents submitted with the Survey, Appendix III, Gary A. Margheim, Deputy Chief for Programs, Soil Conservation Service, U.S. Department of Agriculture, memorandum to Billy Abercrombie, State Conservationist, Soil Conservation Service, Columbia, South Carolina, "Civil Rights and Program Compliance Review, Soil Conservation Service: South Carolina, August 30–September 3, 1993," Sept. 20, 1993.

[598] Ibid., p. 1.

[599] Ibid.

[600] Ibid., p. 13.

[601] Ibid., p. 8.

[602] Ibid., p. 15.

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## Staff Training

The SCS General Manual requires that all employees assigned or having program delivery responsibilities receive civil rights compliance training within 6 months after assuming such responsibilities. The instructions delineate 13 items that should be covered in the training, including the rules and regulations, operations of the civil rights compliance functions within SCS, and development of and skills for preparing the Civil Rights Implementation Plans.[603]

All new employees with civil rights/EEO responsibilities complete training in civil rights compliance.[604] CR&PCD conducts training seminars for staff out of headquarters.[605] CR&PCD conducts training seminars for State and local agency staff "semi-annually." This training includes nine specific delivery-related areas that must be implemented to ensure equity and achieve compliance.[606] The Director conducts most of the civil rights training and will have his staff participate in any other training that may be offered throughout USDA. Although all new employees receive civil rights programmatic training, most of the training occurs "on the job."[607]

CR&PCD developed its own training guide, which includes six modules on Title VI, complete with scripts to assist the instructor.[608] The modules to be used for civil rights training include discrimination, equal opportunity, equal opportunity and program management, compliance reviews, public notification, and representation on district boards.[609] SCS has approved the modules, and CR&PCD last used the guide in 1994, for a 3½-day training course given to the SCS program managers in Nebraska.[610]

## Data Collection, Reporting Requirements, and Analysis

SCS's General Manual includes a section on data collection and reporting.[611] SCS uses data collection for civil rights compliance purposes and related evaluations, including all assessments of the delivery of program benefits to potential beneficiaries on a nondiscriminatory basis. Each SCS program office is responsible for collecting and reporting racial, ethnic, and gender participation data and eligibility data for its programs. CR&PCD must analyze the data each year[612] to measure delivery of program benefits. CR&PCD uses the analysis to determine any disparities and to identify areas for outreach efforts, to provide status reports at the field office level, and to measure progress made regarding program delivery on a nondiscriminatory basis.[613]

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[603] USDA/SCS, *General Manual 230*, § 405.11.

[604] USDA/SCS Survey, Q. 49, p. 36.

[605] Ibid., Q. 50, p. 36.

[606] Ibid., Q. 51, p. 36.

[607] Basu interview, p. 5.

[608] U.S. Department of Agriculture, Soil Conservation Service, "Equal Opportunity/Civil Rights Training Agenda" (undated), Commission files. The Agenda includes training programs which were conducted in several States in 1991. The Agenda includes the participants, and the modules or issues covered. *See also* Arun C. Basu, Director, Civil Rights and Program Compliance Division, Soil Conservation Service, U.S. Department of Agriculture, memorandum, "EOP—Slide/Tape Modules for Training on Civil Rights," National Bulletin No. 230-9-4, Nov. 9, 1988.

[609] U.S. Department of Agriculture, Soil Conservation Service, "Equal Opportunity/Civil Rights Training Agenda" (undated), Commission files.

[610] Basu interview, p. 5.

[611] USDA/SCS *General Manual 230*, § 405.6.

[612] USDA/SCS Survey, Q. 25(f), p. 18.

[613] USDA/SCS, *General Manual 230*, § 405.6(a).

SCS maintains the data. It does not require its recipients to do so. SCS does not require recipients to assess annually minority participation in each program and compare those figures with the established targets, nor does SCS require recipients to submit an annual report to CR&PCD that compares participation in programs with eligibility.[614] SCS shares with recipients data showing delivery of program benefits to diverse clientele groups.[615]

## Civil Rights Implementation Plans

The Commission reviewed SCS Civil Rights Implementation Plans for fiscal years 1990–1994. The fiscal year 1990 Civil Rights Implementation Plan is the most comprehensive, as the other plans are primarily progress and workload and performance reports.

The 1990 Civil Rights Implementation Plan lists SCS's federally assisted and federally conducted programs, describes SCS's approach to civil rights enforcement, and presents SCS's long-range goals and objectives.[616]

The plan contains six long-range goals and major objectives in the areas of policy development, liaison and technical assistance, data evaluation and program analysis, training, preaward reviews, and postaward reviews as required by the Department of Justice. For each long-range goal, the plan includes a "Quarterly Objective and Specific Plan." The objectives are precise and accomplishable.[617]

One long-range policy goal is to provide management oversight and to update the agency's civil rights directive. This will assure that both federally assisted and federally conducted programs utilize civil rights compliance provisions that result in effective enforcement of equal access and opportunity through program delivery.[618] The major objective is to provide guidance and direction to SCS staff at all levels regarding the application of civil rights policy to program delivery and to discuss major provisions of the USDA and Department of Justice regulations relative to program compliance and equity in program delivery.[619]

A second long-range policy goal is to maximize staff knowledge and skills to achieve the agency's mission in civil rights program compliance through planned program outreach, technical assistance, monitoring, and evaluation.[620] The two major methods for achieving this goal are (1) to provide assistance in implementing the agency's action plan to increase representation of minorities, women, and individuals with disabilities on boards, councils, and committees and (2) to provide technical assistance to State staffs at all levels in conducting civil rights program compliance reviews to ensure and extend equal access and equal opportunity to all beneficiaries relative to conservation programs.[621]

A third long-range policy goal is to provide management oversight and direction to assure that the agency's progress reporting system adequately collects and reports program participation data in conformance with departmental regulations and agency civil rights directives.[622] The major objective is to plan, design, and implement a program compliance review strategy as stipulated under the agency civil rights directives to ensure continued verification of parity in program participation data.[623]

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[614] USDA/SCS Survey, Qs. 61–62, p. 40.

[615] Ibid., Q. 59, p. 39.

[616] USDA/SCS FY 1990 Implementation Plan, pp. 10–15.

[617] Ibid., p. 10.

[618] Ibid.

[619] Ibid.

[620] Ibid., p. 11.

[621] Ibid.

[622] Ibid., p. 12.

A fourth long-range policy goal is to provide management the necessary training and policy guidance to assure that supervisors and program managers at all levels utilize both departmental and agency regulations in the delivery of programs and services.[624] The objective is to plan and design two civil rights training courses—one for program managers and supervisors and one for specialists—to help them understand their role regarding compliance in the delivery of programs and services.[625]

A fifth long-range policy goal is to provide appropriate management oversight and review of the activities of recipients to determine that such recipients are voluntarily complying with the nondiscriminatory provisions related to delivery of programs and services.[626] The objective is to review and evaluate the adequacy of memoranda and other agreements with recipient groups (soil and water conservation district boards and other organizations) to assure compliance.[627]

A sixth long-range policy goal is to provide the management oversight and evaluation procedures to assure that SCS delivers its conservation programs and technical assistance on a nondiscriminatory basis and parity in program participation.[628] The objective is for States to conduct about 410 onsite field office postaward reviews to monitor program compliance. CR&PCD will conduct 10 onsite reviews of States and at least 40 field offices.[629]

Except for the 1990 Civil Rights Implementation Plan, the other Civil Rights Implementation Plans are progress and workload activity reports. The fiscal year 1992 Civil Rights Implementation Plan, for example, cited "significant progress" in the area of staff training for civil rights compliance in program delivery. CR&PCD provided technical assistance and staff resources to conduct training in seven States and two national workshops.[630]

The fiscal year 1993 Civil Rights Implementation Plan included information on the progress made in increasing minority and female representation on boards and councils, as well as joint outreach efforts with State conservationists, individual States, and other program divisions within SCS.[631]

Within the last 5 years, SCS's Title VI priorities have included computerized data collection and reporting systems, national training for civil rights compliance, continued oversight through onsite reviews, and to review and update program policies that have disparate impact on beneficiaries.[632]

## Findings and Recommendations

### Organization, Budget, Staffing, and Workload

#### Organization

**Finding:** The structure of civil rights enforcement at the Soil Conservation Service (SCS) has several deficiencies. The Director of the Civil

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[623] Ibid.

[624] Ibid., p. 13.

[625] Ibid.

[626] Ibid., p. 14.

[627] Ibid.

[628] Ibid., p. 15.

[629] Ibid., p. 14.

[630] USDA/SCS FY 1992 Implementation Plan, p. 2.

[631] USDA/SCS FY 1993 Implementation Plan, pp. 2–3.

[632] USDA/SCS Survey, Q. 39, p. 29.

Rights and Program Compliance Division (CR&PCD) does not report directly to the Chief of SCS. Furthermore, the Director of CR&PCD does not have supervisory authority over civil rights personnel in SCS State offices, who instead report to the State conservationists.[633]

**Recommendation:** SCS should restructure its external civil rights staff so that: 1) the Director of CR&PCD reports directly to the Chief of SCS rather than through either the Deputy Chief of Programs or the Deputy Chief of Management; and 2) civil rights personnel in SCS State offices report to the Director of CR&PCD rather than to the State conservationists.

**Finding:** Under a 1994 SCS reorganization, CR&PCD was given the additional responsibility of performing SCS's internal civil rights activities. It is not yet clear whether CR&PCD will be given sufficient resources to carry out its additional responsibilities. Furthermore, the internal organizational structure of CR&PCD has not yet been finalized.[634]

**Recommendation:** SCS should ensure that the transfer of internal civil rights responsibilities to CR&PCD does not have a negative impact on Title VI enforcement. Thus, SCS should ensure that CR&PCD retains at least the same number of staff working on external civil rights activities. Furthermore, SCS should structure CR&PCD with separate units and separate supervisors responsible for internal and external civil rights enforcement.

**Finding:** Most of the day-to-day Title VI enforcement at the SCS is carried out by collateral-duty civil rights personnel in the SCS State offices. These personnel are not trained civil rights specialists, and since they do not work on external civil rights enforcement full-time, they are unlikely to have the degree of experience and expertise necessary for ensuring that recipients are in compliance with Title VI.[635]

**Recommendation:** SCS should require that all State-office personnel performing external civil rights functions be full-time, trained civil rights specialists.

### Budget, Staffing, and Workload

**Finding:** SCS does not have the capability of tracking its Title VI expenditures separately from expenditures on other civil rights activities. As a result, it is critically hampered in any attempt to engage in management planning of its civil rights enforcement activities.

**Recommendation:** SCS should develop and implement an information management system that permits it to track its expenditures on various civil rights activities. SCS should use this system in the development of an annual civil rights enforcement plan showing specifically what activities will be conducted and what resources will be needed for each activity. Furthermore, SCS should use the system to track its expenditures, resources, and workload over time, so that it can demonstrate the need for additional resources to help it address a growing workload.

## General Manual, Policies, Procedures, and Guidelines

**Finding:** SCS's *General Manual 230* is a comprehensive instruction addressing most aspects of SCS's Title VI compliance and enforcement program. It clearly details the responsibilities of the different SCS components, civil rights policies, procedures for compliance reviews, outreach and education requirements, data requirements of SCS recipients, and requirements for providing civil rights training to SCS employees. However, the manual does not indicate standards for compliance with Title VI. Furthermore, the manual does not require SCS to conduct preaward reviews of recipients before releasing funds to them.[636]

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[633] *See* pp. 310–11.

[634] *See* pp. 312–13.

[635] *See* p. 311.

[636] *See* pp. 313–15.

**Recommendation:** SCS should revise its *General Manual 230* to include a section detailing standards for compliance with Title VI and one on preaward reviews. The section on standards for compliance with Title VI should give specific examples that show how Title VI applies to SCS programs. The section on preaward reviews should indicate that preaward reviews are a prerequisite for SCS funding and should provide procedures for conducting preaward reviews, including specifying the types of information that should be considered in the reviews.

## Process of Title VI Enforcement

### Preaward Reviews

**Finding:** Although SCS State conservationists perform preaward reviews of recipients, SCS does not have clear instructions for what a preaward review should entail. Furthermore, the large number of preaward reviews conducted by SCS, more than 3,000 annually, indicates that the reviews are cursory reviews of applications, rather than proper preaward reviews.

**Recommendation:** SCS should conduct proper preaward reviews of all applicants for SCS assistance. These reviews should go beyond ensuring that the applicants have submitted a Title VI assurance. They should consist of analyzing information submitted by the applicant on the programs or projects to be funded, the populations to be served, populations that might be affected negatively by the projects, the applicant's policies and procedures, any discrimination complaints lodged against the applicant, and any previous findings of compliance or noncompliance relating to the applicant, either by SCS or by another government agency. When review of such information reveals a potential problem, SCS should conduct an onsite preaward investigation and require corrective action if necessary before releasing funds.

### Postaward Reviews

**Finding:** SCS has an active postaward review program. The State conservationists review each recipient on a 3–5 year cycle. However, the reviews are conducted by collateral-duty personnel, not by trained civil rights specialists.[637]

**Recommendation:** SCS should ensure that its postaward reviews are conducted by full-time civil rights specialists. Each State should have at least one such specialist to conduct civil rights reviews in that State.

### Outreach and Education

**Finding:** SCS has an active outreach and education program. SCS's General Manual has detailed outreach and education requirements. SCS is particularly active in ensuring that limited-English-proficient populations have access to information in their own languages. However, the small number of Title VI complaints SCS receives (one in fiscal year 1993) is an indication that SCS's outreach and education efforts need to be expanded.[638]

**Recommendation:** CR&PCD should conduct a study of SCS's outreach and education activities to identify areas of weakness and populations that are not being served adequately by SCS's current outreach and education efforts. Based on this analysis, CR&PCD should develop and implement a strategic outreach and education plan to ensure that all recipients, participants, beneficiaries, and the public are aware of SCS's programs and of their rights and responsibilities under Title VI.

## Oversight of State Conservationists

**Finding:** CR&PCD has an active oversight and monitoring program to ensure that the State conservationists are performing their civil rights responsibilities adequately. CR&PCD conducts onsite reviews of each State once every 5 years. However, except during these reviews, CR&PCD does not have much contact with the State conservationists.[639]

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[637] *See* p. 315.

[638] *See* p. 315–17.

[639] *See* pp. 317–18.

**Recommendation:** CR&PCD should supplement its monitoring reviews of the State conservationists by other contacts with the State conservationists. For instance, CR&PCD should expand its technical assistance activities, so that State office civil rights personnel have frequent contact with CR&PCD.

## Staff Training

**Finding:** SCS has a comprehensive training program for its staff engaged in civil rights compliance and enforcement activities. All new CR&PCD staff receive thorough civil rights training, and State office staff receive comprehensive civil rights training, including training on Title VI, twice each year.[640]

**Recommendation:** SCS should continue to provide comprehensive civil rights training, including training on Title VI, to all staff engaged in Title VI compliance and enforcement activities.

## Data Collection, Reporting Requirements and Analysis

**Finding:** SCS's *General Manual 230* has comprehensive data reporting requirements of SCS recipients. SCS uses these data effectively in its Title VI compliance and enforcement program.

**Recommendation:** SCS should continue to collect comprehensive civil rights data from its recipients and to analyze the data in support of its Title VI compliance and enforcement program.

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[640] *See* p. 319.

## Chapter 8

# U.S. Department of Housing and Urban Development

The U.S. Department of Housing and Urban Development (HUD) provides $23.5 billion in Federal financial assistance to approximately 26,000 recipients through 66 different Federal programs.[1] HUD has one of the largest civil rights enforcement offices in the Federal Government. Approximately 226 of the 726 members of its fair housing and equal opportunity staff are involved in Title VI enforcement.[2]

## HUD's Federally Assisted Programs

HUD administers a number of federally assisted programs aimed at both increasing the availability of housing and promoting community economic development. The largest of HUD's federally assisted programs are:

- Under the *lower income public housing program* HUD provides technical and financial assistance to public housing agencies in the operation of public housing projects.[3]

- The *assisted housing program (section 8)* assists low- and very-low-income families in obtaining decent housing by offering rental assistance, rental vouchers, or rental certificates. These funds are distributed to the ultimate beneficiaries through public housing agencies.[4]

- The *home investment in affordable housing (HOME)* program provides formula grants to State and local governments to expand the supply of affordable housing. In addition, the program helps governments develop model programs and implement strategies, including public-private partnerships, designed to increase the supply of affordable housing.[5]

- The *community development block grant (CDBG) program* is designed to develop viable urban communities by providing decent housing, suitable living environments, and expanded economic opportunities, principally for persons of low and moderate income. HUD provides CDBG funds to communities through formula grants. CDBG recipients use HUD funds to promote economic development and neighborhood revitalization activities that benefit persons of low and moderate income. Large cities receive these funds in the form of entitlement grants; small cities receive project grants. HUD also has a CDBG program for States that provides funding to States for use in areas that do not receive entitlement grants.[6]

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[1] U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Housing and Urban Development, Q. 41, p. 32 (hereafter cited as HUD Survey). *See also* U.S. Department of Housing and Urban Development, "FY 1994 Civil Rights Implementation Plan," p. 5 (hereafter cited as HUD FY 1994 Implementation Plan).

[2] HUD Survey, Q. 35, p. 21. *See also* Roberta Achtenberg, Assistant Secretary for Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, letter to Frederick D. Isler, Acting Assistant Staff Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, Apr. 28, 1995, p. 2 (hereafter cited as Achtenberg April 1995 letter). HUD has 726 fair housing and equal opportunity professional and support staff to enforce the civil rights statutes it administers (164 in HUD headquarters, 166 in HUD field offices, and 396 in geographic, formerly regional, offices). Approximately 60 of these staff are responsible for the enforcement of Title VI, in conjunction with other statutes. In addition, approximately 166 field staff "dedicate some portion of their time" to reviewing Title VI programmatic requirements. Few staff are assigned solely to Title VI enforcement. Ibid.

[3] U.S. Office of the Federal Register, National Archives and Records Administration, *United States Government Manual 1989/90* (Superintendent of Documents: Washington, D.C., 1989–1990), pp. 339–40.

[4] U.S. Department of Housing and Urban Development, *Programs of HUD*, 1992, pp. 75–78 (hereafter cited as *Programs of HUD*).

[5] Office of Management and Budget and U.S. General Services Administration, *1993 Catalog of Federal Domestic Assistance* (Superintendent of Documents: Washington, D.C., 1993), vol. 1, p. 278 (hereafter cited as *Catalog of Federal Domestic Assistance*).

## Organization, Budget, and Staffing of HUD's Civil Rights Enforcement Function

HUD's Office of Fair Housing and Equal Opportunity (FHEO), headed by an Assistant Secretary, has responsibility for HUD's Title VI enforcement activities.[7] In addition to civil rights statutes pertaining to HUD's federally assisted and federally conducted programs, FHEO is responsible for enforcing fair housing laws and the Americans with Disabilities Act (ADA).[8] FHEO's regional and field offices, which constitute approximately three-quarters of HUD's fair housing and equal opportunity staff, conduct most of the daily Title VI enforcement activities.[9] HUD's Office of Litigation and Fair Housing Enforcement and field counsels in HUD's geographic offices provide legal support to FHEO through the Office of General Counsel.[10]

FHEO does not have responsibility for HUD's internal equal employment opportunity activities, which are the responsibility of HUD's Office of Departmental Equal Employment Opportunity in the Office of the Secretary.[11] Consequently, unlike some Federal agencies that integrate internal and external civil rights enforcement functions, FHEO is able to concentrate solely on civil rights enforcement related to federally assisted and federally conducted programs. Furthermore, staff within FHEO will not confront pressures from an increased workload in Title VII discrimination complaints or other internal equal employment opportunity matters that will divert staff time or budget resources away from external civil rights enforcement activities, thereby compromising Title VI enforcement efforts.

### Organization Prior to July 7, 1994

Until its recent reorganization, FHEO's headquarters was divided into six main offices. Four of these offices were headed by Directors who reported directly to the Assistant Secretary: the Office of Fair Housing Assistance and Voluntary Programs, the Office of Investigations, the Office of Program Standards and Evaluation, and the Office of Program Training and Technical Assistance. The remaining two offices, the Office of Affirmative Action and EEO and the Office of

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[6] Ibid., pp. 267–72.

[7] HUD Survey, Q. 20, p. 11.

[8] FHEO is responsible for the enforcement of the following statutes: Housing and Urban Development Act of 1968, 12 U.S.C. § 1701 (1988); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988 & Supp. V 1993); Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d–7 (1988); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e–17 (1988 & Supp. V 1993); Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601–3619, 3631 (1988 & Supp. V 1993); Architectural Barriers Act of 1968, 42 U.S.C. §§ 4151–4157 (1988); Section 109 of the Housing and Community Development Act of 1974, 42 U.S.C. § 5309 (1988 & Supp. V 1993); Age Discrimination Act of 1975, 42 U.S.C. §§ 6101–6107 (1988); and the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12,101–12,213 (Supp. V 1993). *See* HUD FY 1994 Implementation Plan, pp. 4–5.

[9] *See* FY 1994 Civil Rights Implementation Plan, p. 12.

[10] Achtenberg April 1995 letter, p. 2.

[11] Achtenberg April 1995 letter, pp. 4–5. Before June 1995, the Secretary of Fair Housing and Equal Opportunity was HUD's designated "Director of Equal Employment Opportunity" for all HUD employees except FHEO employees. HUD's equal employment opportunity activities were carried out by the Office of Affirmative Action and Equal Employment Opportunity, under the Deputy Assistant Secretary for Operations and Management. Ibid.

Management and Field Coordination, reported to the Deputy Assistant Secretary for Operations and Management, who in turn reported to the Assistant Secretary.[12]

The FHEO headquarters offices primarily responsible for Title VI enforcement were:

- The *Office of Investigations*, which was divided into two divisions, the Fair Housing Enforcement Division, responsible for enforcing the Fair Housing Amendments Act of 1988,[13] and the HUD Program Investigations Division (HPID), responsible for investigations pertaining to Title VI and other recipient-related Federal civil rights statutes.[14]

- The *Office of Program Training and Technical Assistance*, which provided training and technical assistance to FHEO staff and provided technical assistance and guidance to non-FHEO organizations with respect to Title VI and other civil rights statutes.[15]

- The *Office of Program Standards and Evaluation*, FHEO's primary policy development and research office.[16]

FHEO's field offices conducted most of HUD's daily Title VI enforcement activities. Staff in these offices and regional offices' Program Operations Divisions were assigned the following enforcement activities:

- preaward and postaward desk-audit and on-site compliance reviews,
- complaint investigations,
- implementing sanctions in cases of Title VI noncompliance,
- technical assistance to State and local governments and other funding recipients, and
- community outreach.[17]

HUD's regional offices reviewed and monitored the Title VI enforcement activities of the field offices and regional Program Operations Divisions.[18]

HUD's regional and field office Title VI staff did not report directly to FHEO headquarters. Instead, they reported to regional directors of fair housing and equal opportunity, who reported to regional administrators, who reported, in turn, to the Deputy Secretary of HUD.[19] Thus, although the regional administrators were responsible to the Assistant Secretary of FHEO for their fair housing and equal opportunity activities,[20] FHEO did not have direct authority over the regional and field staff with Title VI responsibilities. As such, FHEO could not directly oversee and monitor many Title VI implementation and enforcement activities.

### FHEO's Reorganization Effective July 7, 1994

FHEO was substantially reorganized at both the headquarters and field levels as of July 7,

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[12] U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity, "Current Organization," October 1993.

[13] 42 U.S.C. §§ 3601–3619, 3631 (1988 & Supp. V 1993).

[14] HUD FY 1994 Implementation Plan, p. 7.

[15] Ibid., p. 8.

[16] Ibid.

[17] Ibid., pp. 10–11.

[18] Ibid.

[19] U.S. Office of the Federal Register, National Archives and Records Administration, *The United States Government Manual 1993/1994* (Superintendent of Documents: Washington, D.C., 1993), U.S. Department of Housing and Urban Development organizational chart, pp. 330, 337.

[20] Ibid.

1994.[21] At headquarters, FHEO now has three Deputy Assistant Secretaries who report to the Assistant Secretary:[22] the Deputy Assistant Secretary for Enforcement and Investigations, the Deputy Assistant Secretary for Policy and Initiatives, and the Deputy Assistant Secretary for Operations and Management. Of these three principal FHEO managers, the Deputy Assistant Secretary for Enforcement and Investigations is responsible for Title VI enforcement.

The Deputy Assistant Secretary for Enforcement and Investigations directs three program offices:[23] the Office of Investigations, the Office of Fair Housing Initiatives and Voluntary Programs, and the Office of Program Compliance and Disability Rights.[24] The last of these offices consists of the Program Compliance Division and the Disability Rights Division. The Program Compliance Division is responsible for Title VI compliance and enforcement.[25] It also is responsible for compliance and enforcement of section 109 of the Housing and Community Development Act of 1974,[26] the Age Discrimination Act of 1975,[27] and Executive Order 11,063.[28] The Program Compliance Division performs the following civil rights enforcement activities:

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[21] Roberta Achtenberg, Assistant Secretary, Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, letter to Frederick D. Isler, Acting Assistant Staff Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, Nov. 10, 1994, p. 1 (hereafter cited as Achtenberg November 1994 letter).

[22] Ibid., Attachment A: Paul Williams, Deputy Assistant Secretary for Operations and Management, Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, memorandum to all FHEO Directors, re: Headquarters FHEO Reorganization, July 7, 1994, attachment 1 (hereafter cited as Achtenberg November 1994 letter, Attachment A: Headquarters FHEO Reorganization).

[23] Ibid. The Deputy Assistant for Policy and Initiatives also directs three program offices: the Office of Program Standards and Evaluation, the Office of Economic Opportunity, and the Office of Regulatory Initiatives and Federal Coordination. The Deputy Assistant Secretary for Operations and Management directs one program office, the Office of Management and Field Coordination, and the Management Information Services Staff. Within these primary offices, there are also 13 program divisions: the Fair Housing Assistance Program Division, the Fair Housing Enforcement Division, the Voluntary Programs Division, the Fair Housing Initiatives Program Division, the Program Compliance Division, and the Disability Rights Division (within the Office of the Deputy Assistant Secretary for Enforcement and Investigations); the Program Evaluation Division, the Program Standards Division, the Federal Agency Coordination Division, and the Mortgage Lending Insurance Redlining Division (within the Office of the Deputy Assistant Secretary for Policy and Initiatives); and the Budget Division, the Administrative Support and Training Division, and the Field Monitoring and Management Division (within the Office of the Deputy Assistant Secretary for Operations and Management). *See* ibid, for a description of the responsibilities of each of these offices and divisions.

[24] Ibid.

[25] Achtenberg November 1994 letter, p. 1. Under the previous structure HPID was responsible for compliance and enforcement of all statutes relating to HUD programs, including statutes ensuring accessibility and disability rights. However, recognizing the magnitude of this combined responsibility, FHEO created a separate disability rights division, within the Office of Program Compliance and Disability Rights, to address disability and accessibility rights in all HUD programs. Ibid.

[26] 42 U.S.C. § 5309 (1988 & Supp. V 1993).

[27] 42 U.S.C. §§ 6101–6107 (1988).

[28] "Equal Opportunity in Fair Housing," Exec. Order No. 11,063, 3 C.F.R. 652 (1962), *revised in part, revoked in part by* "Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing," Exec. Order No. 12,892, 30 Weekly Comp. Pres. Doc. 110 (Jan. 17, 1994). *See also* "Memorandum on Fair Housing,"30 Weekly Comp. Pres. Doc. 114 (Jan. 17, 1994).

Executive Order 11,063 was previously amended by Executive Order 12,259 which was recently revoked in its entirety by Executive Order 12,892. *See* "Leadership and Coordination of Fair Housing in Federal Programs," Exec. Order 12,259, 3 C.F.R. 307 (1981), *reprinted in* 42 U.S.C. § 3608 (1988), *revoked by* "Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing," Exec. Order No. 12,892, 30 Weekly Comp. Pres. Doc. 110 (Jan. 17, 1994).

- reviews all administrative determinations made by field offices in individual complaints;
- coordinates investigations conducted under more than one civil rights statute;
- provides guidance to field offices on the selection of compliance reviews; provides technical assistance to field offices and program recipients;
- develops guidance on enforcement activities;
- assists in the resolution of civil rights litigation filed against HUD; monitors the enforcement activities of the field offices; and
- develops remedial measures to correct civil rights violations committed by recipients.[29]

Although the Deputy Assistant Secretary for Enforcement and Investigations, and particularly the Program Compliance Division, is responsible for Title VI enforcement, other FHEO offices participate in activities critical to Title VI implementation. For example, the Office of the Assistant Secretary for Policy and Initiatives, particularly the Office of Program Standards and Evaluation, is FHEO's primary policy, research, and liaison office.[30] The Office of the Deputy Assistant Secretary for Operations and Management provides staff training and assistance[31] and also conducts performance and resource evaluation, budget preparation, and management planning.[32]

Although, under the reorganization, these headquarters offices and divisions each play a critical role in providing oversight, guidance, and assistance in FHEO enforcement of civil rights in HUD's federally assisted programs, FHEO's geographic[33] and field offices continue to conduct the daily implementation activities associated with enforcing Title VI. In response to a "Presidential Performance Agreement" between the White House and HUD, fair housing and equal opportunity staff in HUD's field and regional offices were reorganized into fair housing enforcement centers and program compliance operation centers.[34] Instead of 10 regional offices and numerous field offices, the reorganization provides for 10 fair housing enforcement centers; 10 program operations and compliance centers; and 28 smaller program operations and compliance centers.[35] Under the reorganization, FHEO's field staff now report to the Assistant Secretary through her field liaison staff.[36] This restructuring provides FHEO with greater direct control over HUD's Title VI and other fair housing and civil rights enforcement activities.

Each fair housing enforcement center consists of an enforcement division and a fair housing assistance division.[37] Each enforcement division is responsible for processing and investigating complaints, negotiating and monitoring conciliation agreements, and conducting compliance reviews pertaining to the enforcement of all the civil rights statutes administered by HUD, including Title VI.[38] The responsibilities of each fair housing assistance division include the fair housing assistance program (FHAP) and private and administrative enforcement under the fair housing initiatives program (FHIP).[39]

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[29] Achtenberg November 1994 letter, Attachment A: Headquarters FHEO Reorganization, attachment 3, pp. 16–17.

[30] Ibid., pp. 21–22.

[31] Ibid., pp. 6–9. *See also* Achtenberg April 1995 letter, p. 4. Specifically, the Administrative Support and Training Division provides administrative support and coordinates FHEO staff training activities between headquarters, field offices, geographic offices, and the Departmental Office of Personnel and Training. Planning, developing, and resources for FHEO staff training are conducted by FHEO managers. The Office of General Counsel's Office of Litigation and Fair Housing Enforcement also participates in FHEO staff training. Ibid.

[32] Achtenberg November 1994 letter, Attachment A: Headquarters FHEO Reorganization, attachment 3, pp. 6–10.

[33] FHEO's geographic offices were formerly known as regional offices. Achtenberg April 1994 letter, p. 2.

[34] U.S. Department of Housing and Urban Development, "Reinventing HUD: Presidential Performance Agreement, Reorganization, Strategic Performance System, and HUD-Community Partnership," Mar. 3, 1994.

[35] Achtenberg November 1994 letter, Attachment B: FHEO Field Office Structure. FHEO does not divide responsibility for different types of compliance and enforcement mechanisms among its three types of centers. Instead, all field and geographic offices "work closely together in Title VI-related matters." *See* Achtenberg April 1995 letter, p. 3.

[36] Achtenberg April 1995 letter, Attachment A: Headquarters FHEO Reorganization, attachment 3, p. 4. These Field Liaison staff also provide technical assistance to the field offices. Ibid.

Each of the larger regional program compliance operations centers is divided into a compliance division and an operations division.[40] Each compliance division is primarily responsible for conducting proactive compliance reviews, monitoring voluntary compliance agreements, and administering the public housing affirmative compliance action (PHACA) program.[41] Each operations division conducts program monitoring, provides technical assistance and guidance, reviews program applications, and oversees the FHIP education and outreach programs and the creation of new FHIP fair housing organizations.[42] The smaller, more numerous program operations and compliance centers provide program monitoring, review program applications, receive complaints, provide technical assistance and guidance, and oversee the FHIP programs. These smaller field centers do not conduct compliance reviews or negotiate voluntary compliance agreements and do not assist in managing the PHACA program.[43]

Despite the recent reorganization of FHEO, its organizational structure is too complex and fragmented to facilitate effective Title VI enforcement. First, because the policy, research, training, and planning functions are separate from the Office of Program Compliance, interaction and communication is crucial to ensuring a complete and effective Title VI enforcement program. A well-rounded Title VI enforcement program focuses on not only compliance reviews and complaint investigations but also on provision of technical assistance, staff training, outreach and education, and data collection and analysis. Second, the change in the reporting arrangement of field staff from regional directors and administrators to field liaison staff does provide the Assistant Secretary of FHEO with greater direct control of regional and local civil rights enforcement activities. However, it does not ensure that headquarters staff with Title VI responsibilities have direct authority and direction of regional and local Title VI enforcement efforts. Finally, with the variety of centers at the regional and local levels, education is necessary to ensure that recipients and potential and actual beneficiaries fully understand the compliance and enforcement processes as well as which type of center to contact for inquiries, concerns, or needs.

### Budget and Staffing

Because HUD did not provide information on its civil rights budget and staffing prior to 1992, the Commission did not analyze long-term resources trends. However, during the past 2 years, like most other Federal agencies, HUD's civil rights budget increased, from $57.6 million in 1992, to $63.5 million in 1993.[44] Its total civil rights staff simultaneously increased, but less substantially, from 724 in 1992, to 729 in 1993.[45]

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[37] *See* ibid., Attachment B: FHEO Field Office Structure.

[38] *See* ibid.

[39] *See* ibid.

[40] Ibid.

[41] Ibid.

[42] Ibid.

[43] Ibid.

[44] HUD Survey, Qs. 33, 34, pp. 19–20.

Although HUD's budget has a separate allotment for FHEO, FHEO does not separately allocate resources and staff for activities specific to enforcement of Title VI and related statutes.[46] HUD estimates that its actual Title VI expenditures were $1.9 million in FY 1992, and $1.5 million in 1993. These figures do not include staff salaries, which HUD estimates were an additional $3 million for each fiscal year.[47] One civil rights expert has charged that HUD's allocation of only $1.5 million of its $63.5 million civil rights budget to Title VI enforcement in 1993 demonstrates a "critical lack of Title VI enforcement."[48]

## Regulations, Guidelines, Policies, and Procedures

HUD's Title VI regulations and procedures have not been updated since the 1970s. However, HUD has increasingly begun to issue Title VI policy and procedural guidance.

### Regulations

HUD operates under regulations specific to Title VI.[49] HUD's regulations follow the model established by the U.S. Department of Education's (DOEd) Title VI regulations.[50] HUD's Title VI regulations were last updated in 1973 and, therefore, do not reflect recent Title VI developments. For example, HUD has not updated these regulations to reflect the amendment to Title VI created by the Civil Rights Restoration Act of 1987,[51] which amended the definition of "programs or activities" to restore broad coverage for Title VI's nondiscrimination provision.[52] HUD's Title VI regulations also have not been modified to provide examples of discrimination relating to HUD programs, but instead retain most of the education-related examples contained in the DOEd model regulations.[53] Furthermore, because they have not been updated recently, the regulations' "Appendix A" listing HUD's federally assisted programs is outdated. For instance, it does not include a major new HUD program, the home investment in affordable housing program.[54]

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[45] HUD Survey, Q. 35, p. 21. HUD's fiscal year 1994 Civil Rights Implementation Plan indicates that FHEO was allocated a total of 726 full-time equivalent positions in 1993. HUD FY 1994 Implementation Plan, p. 13.

[46] HUD Survey, Q. 29, p. 17.

[47] Achtenberg April 1995 letter, p. 5. In its survey, HUD stated that out of its total civil rights budgets in 1992 and 1993, Title VI expenditures were less than $2,000 each year. However, these figures were inaccurate. HUD Survey, Qs. 33, 34, pp. 19–20.

[48] Thomas J. Henderson, Deputy Director and Director of Litigation, Lawyers' Committee for Civil Rights Under Law (testimony before the Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C., Sept. 30, 1994), p. 8.
FHEO failed to provide the Commission with a breakdown of its civil rights budget. *See* HUD Survey, Q. 29, p. 17.

[49] 24 C.F.R. Subtitle A, Part 1 (1994).

[50] *See* 34 C.F.R. §§ 100.1–100.13 (1994). These regulations were originally promulgated by the former Department of Health, Education, and Welfare.

[51] Pub. L. No. 100–259, 102 Stat. 28 (codified as amended at 20 U.S.C. §§ 1681note, 1687, 1687note, 1688, 1688note (1988); 29 U.S.C. §§ 706, 794 (1988 & Supp. 1993); 42 U.S.C. §§ 2000d–4a, 6107 (1988)).

[52] U.S. Congress, Senate, Committee on Labor and Human Resources, *Civil Rights Restoration Act of 1987*, 100th Cong., 2d sess., S. Rep. No. 64, p. 1, *reprinted in* 1988 U.S.C.C.A.N. 3. In addition, the legislative history indicates that the act clarified the fund termination remedy available when discrimination is "pinpointed" to the program or activity receiving Federal financial assistance, or when the federally assisted program is "infected" by discrimination elsewhere in the operations of the recipient. 1988 U.S.C.C.A.N. at 22. For a further discussion and analysis of the effects of the Civil Rights Restoration Act, see chapter 2, pp. 36–40.

[53] *See, e.g.*, 24 C.F.R. § 1.5(d),(e) (1994).

## Guidelines, Procedures, and Policies

DOJ's coordination regulations require each Federal agency to issue guidelines for Title VI implementation, compliance, and enforcement in *each type* of federally assisted program it administers. The Department of Justice requires that each set of guidelines: (1) explain the exact nature of HUD' Title VI requirements; (2) specify methods for Title VI enforcement; (3) provide examples of practices prohibited by Title VI in the context of each particular type of funding program HUD administers; (4) set forth required or recommended remedial action; and (5) describe "the nature of requirements relating to covered employment, data collection, complaints, and public information."[55] Although HUD has not published Title VI guidelines for each of its federally assisted programs, as required by the Department of Justice, FHEO has distributed much procedural and policy guidance, both related generally to Title VI enforcement and specifically to certain HUD-sponsored programs. However, HUD has issued such guidance only on approximately 20 occasions since Title VI was enacted.

FHEO has disseminated guidance material in the form of "notices" that are analogous to procedures. For example, FHEO has prepared a series of notices instructing civil rights staff on conducting preaward reviews.[56] For HUD's HOME program, FHEO has issued "Guidance for FHEO Review of HOME Investment Partnerships Program Descriptions," which provides civil rights staff with an overview of the HOME program; outlines the responsibilities of civil rights staff in reviewing HOME Program descriptions submitted by applicants; lists the civil rights laws and regulations relevant to the HOME program; instructs civil rights staff to provide technical assistance to applicants, including informing them about all relevant civil rights laws and regulations; and provides detailed guidance on what to consider in their civil rights review of applicants' program descriptions.[57] FHEO has issued similar guidance notices for the comprehensive housing affordability strategy,[58] the CDBG program,[59] the HOPE for homeownership programs,[60] and the section 811 supportive housing for persons with disabilities program.[61]

In addition, FHEO has issued "guidance notices" elaborating HUD policy concerning specific Title VI implementation and enforcement issues. For example, it issued a notice authorizing recipient public housing authorities to implement affirmative action programs to facilitate their Title VI compliance efforts.[62] FHEO also recently issued a notice concerning procedures for processing complaints of employment discrimination filed against funding recipients. The notice provided guidance on handling such complaints to avoid duplicative investigations of recipient employers.[63]

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[54] *See* 24 C.F.R. Part 1, App. A (1994).

[55] 28 C.F.R. § 42.404(a) (1994).

[56] Achtenberg June 1994 letter, p. 4.

[57] U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity, Notice FHEO 92–4, Aug. 3, 1992.

[58] U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity, Notice FHEO 92–2, May 15, 1993.

[59] U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity, Notice FHEO 92–5, Aug. 21, 1992.

[60] U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity, Notice FHEO 92–6, Oct. 19, 1992, and Notice FHEO 92–7, Oct. 19, 1992.

[61] U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity, Notice FHEO 93–1, July 22, 1993.

[62] U.S. Department of Housing and Urban Development, FHEO Notice 90–3, Oct. 25, 1990.

Concerning overall Title VI procedures, FHEO published a Title VI compliance and enforcement procedures handbook in 1976 entitled, *Compliance and Enforcement Procedures for Title VI of the Civil Rights Act of 1964*.[64] That manual specifies Title VI compliance review and complaint investigation procedures. For example, it explains that compliance investigations should be designed to discover increases in discrimination complaints against the recipient at issue, statistical data indicating that a particular minority group is not receiving benefits from or participating in the recipient's federally sponsored program or activity, community patterns of discrimination in similar programs, and the recipient's failure to report compliance activities and status adequately. This procedures manual has never been updated.[65]

FHEO also has produced technical guidance memoranda and manuals outlining enforcement procedures specific to particular funding programs. For example, FHEO has issued memoranda on conducting compliance reviews of public housing authorities[66] and concerning remedies authorized for violations of Title VI.[67] Also, it has drafted a technical guidance manual concerning compliance reviews of low-income public housing programs. This manual embodies comprehensive, detailed procedures for conducting postaward reviews, including executing preliminary desk-audit investigations, evaluating evidence gathered during onsite investigations, analyzing statistical program data, preparing investigation reports, effecting early compliance resolution (including negotiating voluntary compliance agreements), and monitoring recipient performance.[68]

FHEO also has a published handbook elaborating procedures and policy for civil rights enforcement in specific funding programs. In 1989 it issued a handbook describing consolidated policies and procedures for monitoring civil rights in low-income housing programs.[69] The handbook delineates requirements for monitoring of recipient public housing authorities by FHEO field and regional staff, including guidance on targeting organizations to monitor, conducting data collection and analysis, and evaluating recipients' program and activity compliance. HUD also is in the process of completing procedures on voluntary compliance agreements under Title VI.[70]

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[63] U.S. Department of Housing and Urban Development, FHEO Notice 95–1, Feb. 28, 1995.

[64] HUD Survey, Q. 92, p. 55; *See* U.S. Department of Housing and Urban Development, *Compliance and Enforcement Procedures for Title VI of the Civil Rights Act of 1964*, June 1976 (hereafter cited as HUD Title VI Handbook).

[65] HUD plans to update these procedures in the next year. Achtenberg November 1994 letter, p. 2. *See also* HUD Survey, Q. 82, p. 55.

[66] Peter Kaplan, Director, Office of Program Compliance, Office for Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, Technical Guidance Memorandum 88–8: Title VI PHA Compliance Review Outline, July 19, 1988.

[67] Judith Brachman, Assistant Secretary, Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, Technical Guidance Memorandum 88–3: Appropriate Remedies Under Section 504, Title VI, and Section 109, Dec. 4, 1987.

[68] U.S. Department of Housing and Urban Development, Technical Guidance Manual: Title VI Compliance Review of Low Income Public Housing (DRAFT), Oct. 11, 1991. This manual apparently has never been published.

[69] U.S. Department of Housing and Urban Development, Handbook 8004.1, December 1989.

[70] *See* Achtenberg November 1994 letter, Attachment C: Notices, "Procedures for Developing, Negotiating, Issuing, Monitoring and Tracking Voluntary Compliance Agreements Under Title VI of the Civil Rights Act of 1964."

FHEO has issued several policy directives in the form of memoranda.[71] In addition, during the past several years, HUD has been involved in several enforcement efforts,[72] resulting in significant Title VI policy decisions concerning the nature of Title VI violations and remedies available to HUD for achieving recipient compliance.[73] However, HUD has not issued written policy memoranda or statements reflecting these decisions.[74]

## Process of Title VI Enforcement

HUD's Title VI enforcement program is deficient in several respects. First, HUD's civil rights enforcement efforts indicate that it has given Title VI enforcement activities a lower priority than its other civil rights enforcement activities, especially the enforcement of the Fair Housing Amendments Act of 1988.[75] Second, HUD has neglected several enforcement mechanisms that are essential for effective Title VI enforcement, particularly postaward desk-audit reviews, community outreach and public education, and civil rights staff training. Third, although HUD's efforts and plans regarding complaint investigations and staff training indicate a renewed emphasis on Title VI enforcement during the past 2 years, its efforts have not yet had a measurable effect on the quality of its Title VI enforcement program.

### Preaward Reviews

FHEO performs numerous Title VI preaward reviews. For example, in 1993, FHEO conducted

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[71] Jack Kemp, Secretary, U.S. Department of Housing and Urban Development, Memorandum for all Regional Administrators, Apr. 25, 1989 (concerning elimination of public housing authorities' project and location preferences); Nelson Diaz, General Counsel, U.S. Department of Housing and Urban Development, Memorandum for Roberta Achtenberg, Assistant Secretary, Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, Jan. 30. 1994 (concerning the applicability of Title VI to direct contracting activity).

[72] *See* Roberta Achtenberg, Assistant Secretary, Office for Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, and Joseph Shuldiner, Assistant Secretary for Public and Indian Housing, U.S. Department of Housing and Urban Development, letter to Carolyn Hudler, Executive Director, Housing Authority of the City of Beaumont (Texas), Oct. 21, 1993 (hereafter cited as Achtenberg letter to Hudler). Notably, HUD has been named as a defendant in several lawsuits alleging segregation in public housing authorities. One class action, *Young v. Cisneros*, has been in litigation for over 14 years. On February 3, 1994, HUD filed plans with the district court designed to desegregate several East Texas public housing authorities and ensure compliance with Title VI. *See* Young v. Cisneros, Civil Action No. P–80–8–CA (E.D. Tex. Feb. 3, 1994) (notice of filing and desegregation plan). Pursuant to a February 7, 1994, court order in *Sanders v. HUD*, HUD developed a plan to desegregate public housing operated by the Allegheny County Housing Authority. *See* Sanders v. HUD, Civil Action No. 88–1261 (W.D. Pa. Apr. 8, 1994) (notice of filing and desegregation plan).

[73] HUD FY 1994 Implementation Plan, p. 22; U.S. Department of Housing and Urban Development, "Fiscal Year 1992 Civil Rights Implementation Plan," p. 20 (hereafter cited as HUD FY 1992 Implementation Plan).

[74] Judith Keeler, Acting Division Director, Program and Investigation Division, Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, telephone interview, Mar. 31, 1994.

[75] The Commission evaluated HUD's enforcement of The Fair Housing Amendments Act of 1989 and published its findings in September 1994. According to that report, "Budget analyses reveal that an enormous increase in workload has occurred. . .because of increased numbers of complaints. . .vastly increased investigative requirements, and lack of fully certified State and local agencies to process complaints. Consequently, enforcement of the. . .statute has entailed substantial backlogs and lengthy delays in processing cases from the first year in which the law became effective." U.S. Commission on Civil Rights, *The Fair Housing Amendments Act of 1988: The Enforcement Report*, September 1994, p. 221.

10,672 reviews, 206 of which involved onsite investigations.[76] FHEO devoted 110 work years to these preaward reviews.[77] The number of reviews FHEO conducted in 1993 in comparison to the number of work years devoted to the reviews suggests that the reviews were cursory.

The Assistant Secretary for Fair Housing and Equal Opportunity indicated that HUD's preaward reviews "were not designed to be staff intensive." She added:

> They involve the use of in-house data to determine the acceptability of certifications contained in submission documents. These certifications are based on a promise from the recipient that it will comply with the civil rights laws. Unless evidence comes to HUD's attention to challenge this certification, HUD accepts this commitment.
>
> Evidence concerning whether certifications are or are not acceptable is based on generally available facts and data contained in data systems, grantee performance reports, monitoring reports and/or community profiles usually housed in the local HUD Offices. Where problems exist, HUD provides technical assistance and assists the recipient to understand and correct the problem....Preaward reviews do not require the level of scrutiny usually associated with Title VI compliance activity, which is designed to be more intensive in determining whether discriminatory practices exist.[78]

### Postaward Desk-audit Reviews

FHEO does not perform postaward desk-audit reviews of Title VI recipients.[79] The failure to use postaward desk-audit reviews as a Title VI enforcement tool reflects an inefficient utilization of Title VI resources, since postaward reviews enable funding agencies to review large numbers of recipients with comparatively fewer resources. FHEO forgoes the opportunity to use an enforcement tool that, with minimal expenditure of resources, could help identify some Title VI deficiencies without costly onsite reviews, as well as guide its selection of recipients for onsite compliance reviews.

### Onsite Compliance Reviews

The number of compliance reviews FHEO conducts varies considerably from year to year. FHEO conducted 62 onsite compliance reviews in 1988, 152 in 1992,[80] and 73 in 1993.[81] In all years, however, the number of Title VI compliance reviews FHEO performs is small in comparison to the number of HUD funding recipients.[82]

In addition, during the 1980s, FHEO limited its Title VI compliance reviews to public housing authorities.[83] It did not perform the reviews for other major HUD-funded programs, such as the CDBG program. However, recently FHEO has resumed conducting compliance reviews of all HUD funding recipients.[84]

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[76] HUD Survey, Q. 41, p. 32. These figures are inconsistent with HUD's FY 1994 Civil Rights Implementation Plan, submitted to the Department of Justice on February 2, 1994, which stated that FHEO had conducted desk-audit preaward reviews on all of its 8,931 covered grants. *See* HUD FY 1994 Implementation Plan, FY 1993 Workload and Performance Data, p. 54. HUD explained that the inconsistency among these figures results from the variation in the number of applications for competitive programs HUD receives annually. For formula grant programs, such as Emergency Shelter Grants, the numbers do not vary; whereas, for competitive programs, the numbers vary regularly. Hence, the "inventory" of preaward reviews is subject to change. In addition, HUD explained that inconsistencies may result from distinctions between the definitions used by the Department of Justice, the Commission, and HUD. Achtenberg April 1995 letter, p. 7.

[77] HUD FY 1994 Implementation Plan, FY 1993 Workload and Performance Data, p. 54. HUD suggests that 166 work years generally are devoted to conducting preaward reviews. Achtenberg April 1995 letter, p. 9.

[78] Achtenberg April 1995 letter, p. 10.

[79] *See* HUD Survey, Q. 45, p. 35. HUD later indicated that it performs desk-audit postaward reviews of recipients and uses these reviews to select recipients for compliance reviews. HUD stated that "[g]iven the limited resources available for on-site activity, desk audits are an essential component of the Department's post-award review strategy." However, HUD did not provide the Commission with documentation on its postaward desk-audit reviews.

[80] HUD's 1993 Civil Rights Implementation Plan reports that HUD completed 193 onsite compliance reviews in 1992. HUD FY 1993 Implementation Plan, Workload and Performance Data, p. 21.

[81] Achtenberg April 1995 letter, p. 8.

[82] HUD Survey, Q. 68, pp. 43–4. HUD distributed funds to over 25,000 recipients in 1993. Ibid.

### Complaint Investigations

FHEO's complaint workload is dominated by fair housing complaints. It receives relatively few Title VI complaints. For example, in 1993, FHEO received 161 Title VI complaints out of a total of 10,868 complaints. Of these complaints, 10,169 were brought pursuant to the Fair Housing Amendments Act of 1988.[85] During the same year, FHEO only completed investigations on 88 Title VI complaints.[86] HUD received 205 Title VI complaints in fiscal year 1994;[87] however, that remains scant in comparison to the number of fair housing complaints FHEO receives.[88] The low number of Title VI complaints received by FHEO could reflect that its outreach and education are insufficient.

Recently, HUD's headquarters Program Compliance Division investigated six complaints filed against the Housing Authority of the City of Lafayette, Louisiana. The complaints alleged violations of Title VI, as well as Title VIII of the Fair Housing Amendments Act. In the two complaints for which investigations have been completed, HUD found "racial discrimination, retaliation, and segregation."[89]

### Deficiencies, Remedies, and Sanctions

In 1992, out of 152 compliance reviews conducted primarily of public housing authorities, 93 resulted in findings of compliance, and 37 resulted in findings of noncompliance.[90] Similarly, of 109 Title VI complaints investigated in fiscal year 1992, HUD's survey response indicates that 71 resulted in a finding of compliance, while 2 resulted in a finding of noncompliance.[91] In these investigations, FHEO discovered significant compliance problems, such as poor recordkeeping, discarding or discouraging applications because of race, color, or national origin, steering applicants to projects where their race predominated, and failing to provide the same quality of services to tenants in all projects.[92] HUD could not provide the Commission with the number of individuals and amount of monetary award obtained on behalf of victims of discrimination.[93]

FHEO did not execute any Title VI administrative proceedings or enforcement actions in either 1992 or 1993.[94] It temporarily suspended funds in

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[83] Ibid., Q. 82(a), p. 54.

[84] Ibid.

[85] HUD Survey, Q. 71, p. 46. In later correspondence with the Commission, HUD indicated that it had received only 146 Title VI complaints in fiscal year 1993. Achtenberg November 1994 letter, p. 6.

[86] HUD Survey, Q. 74, p. 48.

[87] Achtenberg November 1994 letter, p. 6

[88] HUD recently reported that FHEO regional offices conducted 224 Title VI complaint investigations in fiscal year 1992, and 299 in fiscal year 1993. *See* Achtenberg April 1995 letter, p. 9.

[89] Achtenberg November 1994 letter, p. 6.

[90] HUD Survey, Q. 68, pp. 43–44.

[91] Ibid., Q. 74, p. 48. Thirty-six complaints were still under review at the time HUD completed its survey response.

[92] Ibid., Q. 67, pp. 42–43.

[93] Ibid., Q. 77, p. 50.

[94] Ibid., Q. 80, p. 52. HUD recently suggested that since 1992, FHEO has negotiated approximately 53 voluntary compliance agreements with noncomplying recipients. In addition, HUD indicated that it relies on Corrective Action Orders as a means of deferring funds or imposing sanctions on the use of funds in the Comprehensive Grant Program, which allocates modernization funds to public and Indian housing authorities. Achtenberg April 1995 letter, p. 8.

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one case in 1993, and initiated other administrative actions in two instances in 1992 under other Federal statutes governing federally assisted programs.[95] It also referred one case of Title VI noncompliance to the Department of Justice for litigation during fiscal year 1993.[96]

One reason why HUD has referred few or no cases to the Department of Justice, is that "historically, the Department of Justice has declined to enforce the Department's findings of noncompliance based on disparate impact."[97] In this regard, HUD recommends that "[The Department of Justice] should utilize the effects test in its enforcement actions of Title VI and should coordinate with each affected agency in articulating standards under which the effects test would be used."[98]

Partly in response to lawsuits filed against HUD by plaintiffs alleging violations of Title VI,[99] FHEO has become more active in seeking to compel recipient public housing authorities to come into compliance with Title VI. For example, in 1994, HUD submitted a corrective action order, along with a draft voluntary compliance agreement, to the Housing Authority of Beaumont, Texas. This action was the result of Beaumont Housing Authority's continued failure to resolve outstanding findings of noncompliance with Title VI and to achieve meaningful results in desegregating public housing. The action was intended to ensure that all previously identified findings of violation would be remedied.[100]

### Outreach and Education and Technical Assistance

FHEO performs limited community outreach and public education concerning Title VI. To the extent that FHEO has conducted outreach in recent years, it has focused on section 504 of the Rehabilitation Act of 1973,[101] the Americans with Disabilities Act,[102] and the Fair Housing Amendments Act of 1988, rather than on Title VI.[103] HUD's fiscal year 1994 Civil Rights Implementation Plan provided no indication that FHEO had been involved in Title VI outreach and education during the previous year.[104] In response to a Commission question on the Department's Title VI outreach and education activities, Assistant Secretary Achtenberg indicated that HUD had developed a Title VI fact sheet for distribution to members of the public and advocacy groups upon request.[105] HUD also developed a Title VI educational program for a public housing authority in Wisconsin.[106] In fiscal year 1994, FHEO managers' performance appraisal elements were revised to include an element concerning outreach and education.[107]

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[95] HUD Survey, Q. 79, p. 51.

[96] Achtenberg April 1995 letter, p. 10. This was only the second such referral in HUD's Title VI enforcement history. The first occurred in 1987. Ibid.

[97] HUD Survey, Q. 8, p. 4. In response to the Commission's followup question on this issue, Assistant Secretary Achtenberg indicated that this assertion was based on "anecdotal accounts by persons historically involved in the Department's Title VI implementation efforts," and that she could find no documents stating DOJ's prior position on disparate impact cases. Achtenberg June 1994 letter, p. 2.

[98] HUD Survey, Q. 19, p. 10. The Department of Justice announced a change in policy concerning disparate impact discrimination at HUD's Fair Housing Summit in January 1994. Achtenberg April 1995 letter, p. 11.

[99] *See* footnote 61 above.

[100] *See* Achtenberg letter to Hudler. As noted in footnote 61 of this chapter, the Beaumont Housing Authority is one of those involved in the class action lawsuit, *Young v. Cisneros*, in which HUD has been named as a defendant, and which has been in litigation for over 14 years. On February 3, 1994, HUD filed plans with the district court designed to desegregate Beaumont and several other East Texas public housing authorities and ensure compliance with Title VI. *See* Young v. Cisneros, Civil Action No. P–80–8–CA (E.D. Tex. Feb. 3, 1994) (notice of filing and desegregation plan).

[101] 29 U.S.C. § 794 (1988 & Supp. V 1993).

[102] 42 U.S.C. §§ 12,101–12,213 (Supp. V 1993).

[103] *See* HUD FY 1993 Implementation Plan, p. 26.

[104] *See* HUD FY 1994 Implementation Plan, "Progress Report," pp. 34–45

By contrast, to further its enforcement of fair housing provisions, HUD funds public education and community outreach activities pursuant to the FHIP program established by the Housing and Community Development Act of 1987.[108] FHIP dispenses funds to community groups and fair housing agencies for a variety of outreach and education activities, including mounting media campaigns to inform the public of their rights under fair housing laws, developing educational materials and providing seminars concerning fair housing initiatives, and designing specialized outreach and education projects.[109]

Although FHEO devotes some resources to conducting technical assistance seminars for recipients, these programs have not focused on Title VI enforcement issues.[110] In fiscal year 1993, FHEO's technical assistance efforts focused primarily on the Fair Housing Amendments Act, section 504 of the Rehabilitation Act, section 109 of the Housing and Community Development Act of 1974, and the Americans with Disabilities Act.[111] However, according to Assistant Secretary Achtenberg, FHEO recently has developed a video conference program to provide technical assistance to field office staff. Depending on the needs of the field office staff, the program may provide guidance on Title VI complaint investigation and compliance review procedures.[112]

## Oversight of Continuing State Programs

HUD requires that State recipients, like other HUD funding recipients, submit assurances of nondiscrimination.[113] HUD's Title VI regulations delineate the compliance information required for submission and consideration before funds are granted.[114] HUD also requires State recipients of the CDBG program to provide methods of administration demonstrating the process by which they intend to ensure compliance with Title VI.[115] HUD monitors select program recipients for Title VI compliance. However, it does not monitor all continuing State program recipients on a regular basis.[116] Furthermore, HUD does not systematically evaluate State and local agencies' performance of Title VI compliance and enforcement activities to ensure compliance with Title VI.[117]

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[105] Achtenberg November 1994 letter, p. 5.

[106] Ibid., pp. 4–5.

[107] Achtenberg April 1995 letter, p. 11.

[108] Pub. L. 100–242, 101 Stat. 1815 (1988) (codified as amended in scattered sections of 42 U.S.C.).

[109] Programs of HUD, p. 92. Under FHEO's recent reorganization, the FHIP program is administered by the Fair Housing Initiatives Program Division of the Office of Fair Housing Initiatives and Voluntary Programs. *See* Achtenberg November 1994 letter, Attachment A: Headquarters FHEO Reorganization, attachment 1.

[110] *See* HUD Survey, Q. 52, p. 37.

[111] *See* HUD FY 1994 Implementation Plan, pp. 16–17.

[112] Achtenberg November 1994 letter, p. 4.

[113] *See* 24 C.F.R. § 1.5 (1993). HUD explained that this regulatory provision requires that "every contract for Federal financial assistance" contain assurances that the program or activity at issue will be administered and operated in compliance with Title VI. There is no exemption for State funding recipients. Specific HUD programs also expressly require the submission of assurances of nondiscrimination by State funding applicants. *See, e.g.*, Section 104(d) (5)(b) of the Housing and Community Development Act of 1974, 42 U.S.C. § 5304 (1988 & Supp. V 1993).

[114] 24 C.F.R. § 1.6 (1994).

[115] *See* 24 C.F.R. 570.490(a) (1994).

## Staff Training

FHEO trains all new employees in civil rights compliance and provides civil rights training to regional staff annually.[118] However, it devotes only a small proportion of its training expenditures to Title VI training.[119] In fiscal year 1993, FHEO offered a 3-day training course to two of HUD's regional offices concerning Title VI and related civil rights statutes. However, FHEO's other training activities have not been related to Title VI.[120] FHEO plans to offer several courses on Title VI in fiscal years 1995 and 1996.[121] FHEO also has scheduled staff training in its headquarters and field offices, a significant portion of which will be dedicated to Title VI compliance activities.[122]

## Reporting Requirements and Data Collection and Analysis

FHEO has one of the most comprehensive data collection and analysis systems of the Federal agencies evaluated in this report. FHEO is required to collect data annually concerning the racial and ethnic characteristics of applicants for, participants in, and beneficiaries of all of HUD's federally assisted programs.[123]

For HUD's public and federally assisted housing programs, the data are recorded on HUD's form 50058,[124] which requests detailed information on each family applying for or receiving public housing, including the number, age, sex, and disability status of family members, race/ethnicity of the household head, sources and amounts of family income, as well as on their program participation. These data are compiled and maintained in HUD's Multifamily Tenant Characteristics System.[125]

HUD uses the data to prepare an annual report to Congress on fair housing and civil rights, and in its compliance reviews of its recipients. For instance, according to the Assistant Secretary:

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[116] HUD also explained that FHEO staff generally monitor all public housing authorities and CDBG and HOME program recipients for Title VI compliance. FHEO staff select recipients to be monitored "through a system of risk analysis that rates all recipients according to a number of criteria, including the severity of any civil rights problems." Achtenberg April 1995 letter, pp. 13–14.

[117] In response to a Commission question asking how HUD ensures Title VI compliance for the CDBG program, Assistant Secretary Achtenberg indicated that States' responsibilities under HUD's regulations are clear: they may not discriminate and they may not distribute funds to subrecipients who discriminate. Achtenberg June 1994 letter, p. 2.

[118] HUD Survey, Qs. 49–50, p. 36.

[119] Out of total estimated expenditures for staff training in fiscal years 1992 and 1993 of $1.2 million and $952,000, respectively, HUD devoted only $14,000 in 1992 and $3,000 in 1993, or 1.2 percent and 0.3 percent of the total training expenditures, respectively, to Title VI training. These figures are for FHEO staff only, suggesting that FHEO is unaware of how much and what types of civil rights training is being given regional and field staff. *See* HUD Survey, Qs. 33, 34, pp. 19, 20.

[120] HUD FY 1994 Implementation Plan, pp. 28–29.

[121] Achtenberg November 1994 letter, p. 6. Achtenberg April 1995 letter, p. 15.

[122] Achtenberg April 1995 letter, p. 15.

[123] Achtenberg June 1994 letter, p. 5.

[124] U.S. Department of Housing and Urban Development, *Multifamily Tenant Characteristics System (MTCS), Form HUD–50058 Information Packet*, July 1993, p. 1–1. Form 50058 requests participant information for HUD's Public Housing, Indian Housing, section 8 Rental Vouchers and Rental Certificates, including Manufactured Home Spaces, and section 8 Moderate Rehabilitation programs. Ibid.

[125] Ibid.

In conducting compliance reviews, the former Regional Offices use data generated by the Form 50058 to build a computer data base to analyze tenant selection and assignment data of the public housing agency under review. The particular computer software now used is the PHACA software [generated as part of the PHACA program]. The data generated assists the former Regional Office in determining a public housing agency's Title VI compliance or noncompliance in its Tenant Selection and Assignment Plan and with the Department's Title VI regulation.[126]

To facilitate analysis of the data collected from recipients, HUD has developed a database system called the "CONQUEST Data System," which can provide "demographic and economic data, and a graphic profile, which thematically maps specific demographics at the state, county and [Census] tract level"[127] for comparison with recipient data.

In addition to the data collected on recipients of housing assistance through form 50058, HUD collects data on participants and beneficiaries of its other programs through grantee performance reports that HUD requires of its recipients.[128]

## Civil Rights Implementation Plans

The Commission reviewed HUD's Civil Rights Implementation Plans for the years 1990–1991,[129] 1992,[130] 1993,[131] and 1994.[132] Contrary to the purpose established by the Department of Justice, HUD's Civil Rights Implementation Plans fail to serve as an informational tool for the Department of Justice and the general public and as a management and planning tool for HUD.

The goals and objectives sections of the Civil Rights Implementation Plans varied considerably. The 1990–1991 Civil Rights Implementation Plan had three long-range goals, with one major objective per goal. Although the Department of Justice's guidelines require at least one major objective for each functional category, such as preaward reviews, postaward reviews, and enforcement monitoring,[133] HUD's 1990–1991 plan failed to meet this requirement. Furthermore, the major objectives were vague, in that they did not, as required, "imply criteria for measuring accomplishment."[134] The 1990–1991 Civil Rights Implementation Plan had a number of short-term objectives under each major objective, most of which were sufficiently specific that it could be determined whether they were accomplished.[135]

The 1992 Civil Rights Implementation Plan did not contain long-range goals.[136] It had only one major objective, "the development of criteria and standards and provision of training and written guidance on the requirements of the Department's Section 504 Federally Conducted Program rule,"[137] which did not apply to Title VI. Associated with the major objective were three short-term objectives. The 1992 Civil Rights Implementation Plan included a lengthy "progress report" on FHEO's accomplishments during 1990 and 1991.[138] However, these accomplishments were not related to the short-term objectives laid out in the 1990–1991 plan.

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[126] Achtenberg June 1994 letter, p. 6.

[127] Ibid.

[128] U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity, *Annual Civil Rights Data Report to Congress: HUD Program Applicants and Beneficiaries*, 1992, p. 2.

[129] U.S. Department of Housing and Urban Development, "Fiscal Years 1990/1991 Civil Rights Implementation Plan" (hereafter cited as HUD FY 1990/91 Implementation Plan).

[130] U.S. Department of Housing and Urban Development, "Fiscal Year 1992 Civil Rights Implementation Plan" (hereafter cited as HUD FY 1992 Implementation Plan).

[131] HUD FY 1993 Implementation Plan.

[132] HUD FY 1994 Implementation Plan.

[133] U.S. Department of Justice, "Guideline for Agency Implementation Plans Required by Executive Order 12250, 'Leadership and Coordination of Nondiscrimination Laws'" (no date), p. 9 (hereafter cited as DOJ Guideline for Agency Implementation Plans).

[134] Ibid.

[135] HUD FY 1990/91 Implementation Plan, pp. 26–29.

[136] Presumably these goals remained the same as in the previous year.

The 1993 Civil Rights Implementation Plan specified six long-range goals and listed several major objectives and a series of "activities"[139] corresponding with each goal. Four of the long-range goals applied to Title VI, along with other statutes:

> Goal #1: "Enhance the efficiency with which the investigation of complaints filed under Title VI, Section 504, Section 109, the ADA, and the Age Discrimination Act of 1975 are completed."
>
> Goal #2: "Improve the intake, management and control of complaints filed under Title VI, Section 504, Section 109, the ADA, and the Age Discrimination Act of 1975."
>
> Goal #3: "Increase HUD-initiated activities for the enforcement of Title VI, Section 504, Section 109, the ADA, and the Age Discrimination Act of 1975."
>
> Goal #4: "Improve the quality of the disposition of complaints and compliance reviews under Title VI, Section 504, Section 109, the ADA and the Age Discrimination Act of 1975."[140]

The major objectives in the 1993 Civil Rights Implementation Plan conformed with the Department of Justice's requirement that such objectives imply criteria for measuring accomplishment. For instance, one such objective read, "[c]omplete the review of all cases referred to Headquarters under Title VI, Section 504, Section 109, the ADA, and the Age Discrimination Act within 10 days of receipt. . . ."[141] The listed activities were very specific. Like the previous year's plan, the 1993 Civil Rights Implementation Plan gave a long list of specific accomplishments in its "progress" report section, but the accomplishments were not tied clearly to the previous year's goals and objectives.[142]

HUD's 1994 Civil Rights Implementation Plan included three long-range goals, two or three major objectives for each goal, and a number of "activities" related to each objective. The long-range goals were to: 1) reduce discrimination through aggressive enforcement; 2) affirmatively further fair housing in HUD and other Federal programs; and 3) eliminate discrimination against and unnecessary barriers to participation by persons with disabilities in HUD programs.[143] The major objectives and activities were more specific than the long-range goals; however, they did not include timeframes for their accomplishment. Like the previous year's plan, the 1994 plan listed a number of activities in its "progress" report section; however, these activities were not discussed in terms of the previous year's objectives.[144]

HUD's Civil Rights Implementation Plans do not demonstrate that the agency's goals and objectives considered available and projected budget, staffing, and workload. For instance, although the Department of Justice's guidelines require that available staff and budgetary resources be discussed "in light of" the agency's workload,[145] HUD's Civil Rights Implementation Plans, like those of other agencies, merely set forth budget amounts and staff inventories, without correlating them to FHEO's workload.[146]

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[137] HUD FY 1992 Implementation Plan, p. 24.

[138] Ibid., pp. 22–24.

[139] Presumably activities correspond to short-term objectives.

[140] HUD FY 1993 Implementation Plan pp. 35–39.

[141] Ibid., p. 35.

[142] Ibid., pp. 27–35.

[143] HUD FY 1994 Implementation Plan, p. 30.

[144] Ibid., pp. 34–42.

HUD's Civil Rights Implementation Plans are inconsistent, among years and within each plan. Often, they do not meet the requirements of the Department of Justice's guidelines. In addition to those instances noted above, HUD's sections on "Organization" are unclear and do not explain the relationship between headquarters and field and regional offices adequately.[147]

## Planning and Priorities

HUD maintains that its Title VI enforcement program has been strengthened.[148] As an example, HUD cites its efforts to end segregation in public housing in east Texas. HUD notes that it has expanded its definition of what constitutes a violation of Title VI[149] and has used "new and creative remedies" to correct violations.[150] HUD also cites the inclusion of Title VI enforcement data in an existing database and its Title VI training and technical assistance visits to its regional offices, as well as efforts to assess regional offices' Title VI complaint investigations and compliance reviews by FHEO's quality assurance staff.[151] Finally, HUD contends that its ongoing reorganization of its headquarters and field offices reflects "a renewed emphasis on Title VI."[152]

Unlike many civil right offices, FHEO has separate units devoted to setting priorities and enforcement planning. The Office of Program Standards and Evaluation under the Deputy Assistant Secretary for Policy and Initiatives is responsible for developing long-range strategies and evaluating HUD programs and policies.[153] It prepares an Annual Program Performance Plan Worksheet that includes performance measures based on HUD's mission as it relates to FHEO.[154] The Field Monitoring and Management Planning Division under the Deputy Assistant Secretary for Operations and Management is responsible for developing and managing the FHEO Management Plan.[155] HUD indicated that its Field Management Plan establishes goals and objectives for each of the civil rights statutes administered by FHEO and requires quarterly progress reports. In addition, each FHEO geographic and field office is required to have a Field Management Plan.[156] However, HUD did not provide the Commission with its plans or with its Annual Performance Plan Worksheet.

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[145] DOJ Guideline for Agency Implementation Plans, p. 8.

[146] *See, e.g.*, HUD FY 1993 Implementation Plan, pp. 11–12.

[147] DOJ Guideline for Agency Implementation Plans, p. 8. DOJ's guidelines require: "[T]he agency should show its relationship to any regional or field offices . . . and indicate the lines of authority." Ibid. HUD's discussion does not explain the reporting relationship of field and regional offices to FHEO headquarters.

[148] HUD Survey, Qs. 39, 82(a), pp. 31, 54.

[149] The survey response does not give any further detail on this.

[150] HUD Survey, Q. 39, p. 31.

[151] Ibid.

[152] Ibid., Q. 82(e), p. 54.

[153] Achtenberg November 1994 letter, Attachment A: "Headquarters FHEO Reorganization," attachment 3, pp. 21–22.

[154] Achtenberg April 1995 letter, p. 9.

[155] Achtenberg November 1994 letter, Attachment A: "Headquarters FHEO Reorganization," attachment 3, pp. 9–10.

[156] Achtenberg April 1995 letter, p. 9.

# Findings and Recommendations

## Organization, Budget, and Staffing of HUD's Civil Rights Enforcement Function

### Organization—Generally

**Finding:** The U.S. Department of Housing and Urban Development's (HUD) Office of Fair Housing and Equal Opportunity (FHEO), headed by an Assistant Secretary, is responsible for Title VI enforcement in HUD's federally assisted programs. FHEO does not have responsibility for HUD's internal equal employment opportunity activities. This arrangement allows FHEO to focus solely on external civil rights enforcement concerns that relate to HUD's federally assisted and federally conducted programs. Furthermore, an increased workload in internal civil rights enforcement will not directly compromise HUD's external civil rights enforcement functions, since these two types of enforcement activities are separated into different offices. FHEO's regional and field offices constitute approximately three-quarters of HUD's civil rights staff and conduct most of the daily Title VI enforcement activities.[157] Even following HUD's recent reorganization of FHEO's organizational structure, both at the headquarters level and the field and regional levels, the arrangement remains complex and fragmented.

**Recommendation:** Although it remains too soon for the Commission to evaluate FHEO's reorganization comprehensively, FHEO should commence evaluating its external civil rights enforcement performance, especially its Title VI enforcement efforts, under its new structure.

### Organization—Headquarters

**Finding:** At the headquarters level, FHEO is divided into three principal units, each headed by a Deputy Assistant Secretary who reports to the Assistant Secretary for FHEO. The Office of the Deputy Assistant Secretary for Enforcement and Investigations has Title VI enforcement authority. Within the Office of the Deputy Assistant Secretary for Enforcement and Investigations, the Program Compliance Division, part of the Office of Program Compliance and Disability Rights, has responsibility for Title VI implementation and enforcement. Its specific responsibilities include overseeing, monitoring, coordinating, and providing guidance to FHEO's field and regional staff. FHEO's other two primary units, the Offices of the Deputy Assistant Secretary for Policy and Initiatives and for Operation and Management also participate in critical Title VI implementation activities. For example, the Office of the Assistant Secretary for Policy and Initiatives, particularly the Office of Program Standards and Evaluation, is FHEO's primary policy, research, and liaison office. The Office of the Deputy Assistant Secretary for Operations and Management, particularly the Office of Management and Field Coordination, is FHEO's primary training and assistance office. The Office of Management and Field Coordination is also FHEO's performance and resource evaluation, budget preparation, and planning office.[158]

**Recommendation:** Since the Office of Program Compliance and Disability Rights has responsibility for Title VI implementation and enforcement, HUD should ensure that this office maintains sufficient communication and interaction with the Offices of the Deputy Assistant Secretary for Policy and Initiatives and for Operation and Management to ensure prominence and attention to Title VI concerns. This communication is necessary unless HUD opts to incorporate Title VI planning and policy staff into an office with Title VI enforcement staff . In particular, since the Office of Program Compliance oversees, monitors, and coordinates the efforts of FHEO's field and regional staff, it is in the position to identify activities in which these staffs require assistance or training that would be provided by the Office of Management and Field Coordination. Also, through reviewing administrative determinations made by field offices in complaints, the

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[157] *See* pp. 326–30.

[158] *See* p. 329.

Office of Program Compliance may recognize issues in need of policy clarification or areas in need of different program standards. It should communicate these concerns to the Office of Program Standards and Evaluation.

**Finding:** FHEO's present organizational structure is an improvement over its previous structure. For example, under the previous structure, HPID (now the Program Compliance Division) was responsible for compliance and enforcement of all statutes relating to HUD programs, including Title VI, as well as statutes ensuring accessibility and disability rights. However, recognizing the magnitude of this combined responsibility, FHEO created a separate disability rights division within the Office of Program Compliance and Disability Rights to address disability and accessibility rights in all HUD programs.[159]

**Recommendation:** HUD should maintain this division between disability rights activities and other civil rights enforcement responsibilities. It should consider the feasibility or necessity of creating other divisions within FHEO based on areas of civil rights as it performs an evaluation of its current civil rights enforcement performance under the new organizational arrangement.

**Finding:** FHEO's structure for external civil rights enforcement remains problematic in several respects. For example, FHEO has no legal staff to provide the legal interpretation and guidance crucial to effective Title VI (and other external civil rights) enforcement. In addition, FHEO's structure is extremely fragmented: its policy and planning staff are separated from its external civil rights enforcement operations, and regional and field level implementation and enforcement staff are many levels removed from headquarters staff who are responsible for oversight, monitoring, and guidance.

**Recommendation:** As part of its performance evaluation, FHEO should consider acquiring independent legal staff to provide the legal guidance and interpretation necessary for comprehensive Title VI enforcement. It should also consider incorporating policy and planning staff in the same general headquarters office or unit as Title VI enforcement staff, to provide such staff with direct policy guidance critical to uniform Title VI enforcement efforts and to ensure that Title VI enforcement responsibilities are considered meaningfully in office planning activities.

### Organization—Field and Regional Offices

**Finding:** Under the previous organization, HUD's regional and field office staff did not report directly to FHEO headquarters. Instead, they reported to regional directors, who reported to regional administrators, who reported, in turn, to the Deputy Secretary of HUD. Although the regional administrators were responsible to the Assistant Secretary of FHEO for their civil rights activities, FHEO did not have direct authority or oversight over the regional and field staff who performed many Title VI implementation and enforcement activities. HUD reorganized to ensure that FHEO, the office ultimately responsible for civil rights enforcement in HUD's federally funded programs, had direct line authority over all FHEO external civil rights staff. FHEO's field staff currently report to the Assistant Secretary through her field liaison staff.[160] Although this arrangement facilitates FHEO's direct authority over all of its external civil rights enforcement staff, it does not ensure that those headquarters staff with Title VI enforcement responsibilities will have direct oversight and supervision of field and regional staff performing Title VI enforcement activities.

**Recommendation:** FHEO should consider centralizing its field and regional staff to establish more direct reporting to FHEO headquarters by field and regional staff performing Title VI enforcement activities and to ensure direct oversight and monitoring of field and regional staff by headquarters staff ultimately responsible for Title VI enforcement. If FHEO maintains the field liaison reporting arrangement, it should assign field liaison staff to certain areas of civil rights. The field liaison staff member assigned to Title VI should communicate and coordinate with the headquarters staff members involved with specific areas of civil rights enforcement. This coordination will enable the Assistant Secretary to envision as a whole the status and progress in Title VI enforcement at both headquarters and regional levels. Otherwise, FHEO should consider having field and regional staff with Title VI responsibilities report to an individual within the headquarters office overseeing Title VI enforcement who, in turn, will report to the Assistant Secretary on progress in enforcing Title VI.

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[159] *See* p. 328.

[160] *See* p. 329.

**Finding:** At the field and regional levels, HUD's civil rights staff are organized into fair housing enforcement centers and program compliance operation centers. The fair housing enforcement centers are generally responsible for conducting complaint intake and investigations, negotiating and monitoring conciliation agreements, and overseeing the FHIP and FHAP programs. The larger program compliance operation centers ensure recipient compliance, provide technical assistance to recipients, conduct community outreach and public education, and monitor programs. The smaller more numerous program compliance operation centers perform similar functions but do not conduct compliance reviews.[161]

**Recommendation:** It remains too soon for the Commission to evaluate this field and regional structure comprehensively. FHEO should study and analyze the impact of this restructuring on HUD's external civil rights enforcement efforts. It should assess whether this arrangement facilitates its Title VI enforcement program at the regional and field level.

### Budget and Staffing

**Finding:** Although HUD's budget includes a separate allotment for FHEO, FHEO does not maintain an account specific to external civil rights enforcement in HUD's federally funded fair housing programs. Although FHEO has a budget office and an office responsible for FHEO's management planning, HUD did not provide the Commission with evidence that it tracks its external civil rights expenditures and resources separately for different civil rights activities, such as preaward reviews, postaward reviews, outreach and education, and technical assistance. Furthermore, HUD did not provide the Commission with copies of its management plans.[162] As a result, the Commission has no indication that HUD has in place the kind of management information system necessary to ensure effective management planning of its Title VI compliance and enforcement program.

**Recommendation:** FHEO should develop a separate budget activity for external civil rights enforcement related to federally funded programs. That allocation should be developed by FHEO's Assistant Secretary (in conjunction with the Deputy Assistant Secretary for Enforcement and Investigations, the head of the Office of Program Compliance, and the head of the Office of Management and Field Coordination) and should be directed at (identified with) specific enforcement mechanisms performed by the different offices and divisions involved in external civil rights implementation and enforcement activities. FHEO should develop and maintain a management information system that tracks its expenditures and resources separately for fair housing enforcement and external civil rights, and also for specific civil rights activities, such as complaint investigations and outreach and education. This will enable the Assistant Secretary, FHEO, to ascertain increases or decreases in resources designated and available for various external civil rights responsibilities and to base essential enforcement decisions, such as staffing assignments and future enforcement funding requests, upon such information. In addition, it will enable FHEO to share staff and resources designated for external civil rights enforcement with other civil rights functions without commingling such staff and resources at the expense of external equal opportunity responsibilities.

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[161] *See* p. 330.

[162] *See* p. 330.

## Regulations, Guidelines, Policies, and Procedures

### Regulations

**Finding:** HUD's Title VI regulations were last updated in 1973 and, therefore, do not reflect recent Title VI developments, such as the amendment to Title VI by the Civil Rights Restoration Act of 1987. The "Appendix A" to the regulations contains an outdated list of HUD federally assisted programs. Furthermore, the regulations have not been modified to provide examples of discrimination relating to HUD programs, but instead retain most of the education-related examples provided by the Department of Education (formerly the Department of Health, Education and Welfare) in the model regulations. HUD intends to issue revised Title VI regulations clarifying the effect of the Civil Rights Restoration Act, HUD's complaint and compliance review procedures, and HUD's use of interim sanctions in its Title VI enforcement.[163]

**Recommendation:** HUD must proceed with its plans to issue revised regulations and/or guidance and clarification specific to the current and practical implementation and enforcement of Title VI. In particular, it must address the clarification made to Title VI by the Civil Rights Restoration Act of 1987; it must issue an updated appendix listing its federally assisted programs; and it must elaborate examples of discrimination relating to *each type* of federally assisted program it administers. As an alternative to listing its federally assisted programs in the appendix to the Title VI regulations, HUD may choose to refer in the regulations to a HUD publication listing HUD's programs (for instance, in 1992, HUD issued a book entitled *Programs of HUD*). However, if the appendix refers to such a publication, HUD must ensure that publication is updated regularly and made available readily to the public.

### Guidelines

**Finding:** Although HUD has not published Title VI guidelines for each federally assisted program it administers, as required by the Department of Justice, FHEO has distributed much procedural and policy guidance, both related generally to Title VI enforcement and specifically to certain HUD-sponsored programs. However, HUD has issued such guidance only on approximately 20 occasions since Title VI was enacted.[164]

**Recommendation:** FHEO must provide Title VI enforcement staff and funding recipients with step-by-step instructions for implementing Title VI, from the application and preaward process, through compliance review and complaint processing, and through negotiating and monitoring recipient compliance, in *each type* of program HUD sponsors. This is especially important for State and local-administered programs, such as the community development block grant or home investment in affordable housing programs. Since such programs are actually managed by State or local agencies, they involve special and more complicated enforcement issues related to FHEO's oversight and monitoring of State and local agencies' Title VI implementation efforts, such as the collection and evaluation of assurances of nondiscrimination before funds are granted and methods of administration after funds have been granted. It is critical that both FHEO staff and State and local recipients understand how to conduct the Title VI enforcement mechanisms particular to such programs. For such guidelines to be effective, they should establish methods of administration or requirements for States and local government agencies assuming Title VI compliance responsibility for HUD's ultimate funding recipients, and ensure that recipients conduct self-assessments of their compliance status and take action to remedy any deficiencies discovered. In addition, such guidelines should include definitive implementation, compliance, and enforcement standards and procedures for the States and local agencies assuming Title VI responsibility, including, for example, detailed investigative methods and remedial action procedures. The guidelines must also set forth and explain the process for data collection from funding recipients, including instructions and specific examples concerning the type of data and information that must be maintained by recipients and applicants. They also should address requirements for public education and community outreach related to the nondiscrimination mandate of Title VI.

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[163] *See* pp. 331–32.

[164] *See* pp. 332–34.

### Policies

**Finding:** FHEO has issued "guidance notices" elaborating HUD policy on certain Title VI implementation and enforcement issues. HUD has been involved in several enforcement efforts resulting in significant Title VI policy decisions although it has not issued written policy memoranda or statements on these decisions.[165]

**Recommendation:** FHEO should commence to develop policies concerning Title VI implementation and enforcement more regularly. Such policies should be aimed at providing civil rights enforcement staff and funding recipients with a complete understanding of the meaning and intent of Title VI compliance relative to the specific programs HUD administers. In particular, FHEO should issue policy directives concerning administrative and procedural issues particular to Title VI enforcement in HUD's State- and locally administered programs, such as the community development block grant and home investment in affordable housing programs. Such issues might include the delegation of certain Title VI implementation and enforcement mechanisms to State or local officials actually responsible for administering such programs and monitoring subrecipient compliance. In addition, FHEO should disseminate policy concerning discriminatory practices prohibited in specific types of HUD programs, such as the steering of applicants of a particular race to housing occupied predominately by tenants of the same race in HUD's publicly assisted housing programs. In addition, FHEO should continue to develop regular policy statements on developing and changing legal issues affecting Title VI compliance, such as changes in case decisions, amendments to statutes, and revisions in regulations or policies affecting Title VI compliance.

### Procedures

**Finding:** FHEO has produced several technical guidance memoranda and manuals, as well as a handbook, outlining enforcement procedures specific to certain funding programs. However, HUD has not revised its only comprehensive procedures manual designed specifically for Title VI compliance and enforcement procedures, which was published in 1976.[166]

**Recommendation:** HUD should continue its practice of issuing technical guidance memoranda, manuals, and handbooks on program-specific procedures as new programs develop. In addition, HUD should update its current compliance and enforcement procedures manual for Title VI.

## Process of Title VI Enforcement

### Preaward Reviews

**Finding:** Unlike most Federal agencies, HUD performs numerous Title VI preaward reviews. However, the number of reviews conducted, in comparison to the number of work years devoted to such reviews, suggests that the reviews FHEO staff conduct are cursory.[167]

**Recommendation:** FHEO should concentrate on ensuring the quality of its preaward reviews, rather than merely the quantity of such reviews. Otherwise, the purpose of conducting preaward reviews will not be realized. To achieve quality preaward reviews, FHEO should ensure that each review involves an examination and evaluation of the following: 1) implementation and enforcement policies and documentary information on specific compliance activities; 2) statistical evidence on program and activity participation rates by racial and ethnic minorities, such as the racial or ethnic composition of low-income tenants in its federally sponsored housing facilities;

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[165] *See* pp. 332–34.

[166] *See* p. 333.

[167] *See* pp. 334–35.

3) applications or interview material related to program or participation acceptance or selection; 4) data and information related to the demographic makeup of the program's affected community or pool of potential participants; 5) statistical evidence related to application rejection rates; and 6) community outreach and public education materials. Each FHEO preaward review should be designed to determine a recipient's compliance status by identifying potential discrimination, such as evidence of unequal numbers of ethnic and racial minority applicants and nonminority applicants, or evidence of racially or ethnically segregated publicly sponsored housing facilities.

The Commission concurs with the Department of Justice that preaward reviews, both desk audit and on site, are essential to an effective Title VI enforcement program and, therefore, FHEO should conduct them on all HUD program applicants and recipients. However, the Commission recognizes the budget and staffing limitations of FHEO. It realizes that, with continuing emphasis on downsizing and restructuring the Federal Government and maintaining fiscal responsibility, FHEO may be unable to acquire additional staff to strengthen fully all aspects of HUD's Title VI implementation, compliance, and enforcement program. The Commission also understands that a lengthy preaward process will delay program benefits and, in effect, adversely impact on ultimate beneficiaries. In light of these factors, the Commission recommends some alternative strategies that will promote a meaningful and efficient preaward process on as many applicants and recipients as possible, eliminating reliance on cursory preaward reviews. These strategies should serve only as a secondary alternative to the optimal preaward compliance review process described above. Although this alternative may not be the most effective at ensuring full enforcement of Title VI, it should allow agencies to have some type of meaningful preaward review mechanism without critically impacting on Title VI enforcement.

### Postaward Desk-Audit Reviews

**Finding:** HUD does not perform postaward desk-audit reviews of Title VI recipients. FHEO's failure to conduct such reviews indicates a misappropriation of its resources, because desk-audit reviews can be equally as comprehensive as onsite reviews, but can be accomplished more quickly and with fewer resources.[168]

**Recommendation:** FHEO should utilize preliminary postaward desk-audit reviews, before committing staff and resources to costly, time-consuming onsite compliance reviews, to ascertain continuing recipient compliance with Title VI. For such reviews to effectuate their purpose, FHEO's postaward desk-audit reviews should be designed to: 1) identify deficiencies in recipients' delivery of program services to potential and actual participants and beneficiaries of all races and ethnicities, such as unequal numbers of minority and nonminority publicly assisted housing tenants, suggesting that minorities are placed less often and forced to wait longer periods of time for affordable housing; 2) investigate allegations of discriminatory barriers to program participation, such as requiring low-income or "homeless" assisted-housing applicants to submit tenancy histories or particular types of references, or disparate treatment in program participation, such as intentional race-based segregation of housing facilities; 3) evaluate recipients' public education of program accessibility; and 4) identify recipients needing technical assistance or further onsite investigation. They should also be designed to fit each particular type of HUD funding program, including State- and locally administered programs. The results of a postaward review must be in writing and must include specific findings and recommendations for achieving compliance. As with preaward reviews, postaward desk-audit reviews would necessarily be limited to documentary evidence concerning recipients' administration of Federal programs.

### Onsite Compliance Reviews

**Finding:** The number of compliance reviews HUD conducts varies annually. Generally, the number of Title VI compliance reviews HUD performs is small in comparison to the number of HUD funding recipients. In addition, HUD has limited its Title VI onsite compliance reviews to public housing authorities, failing to perform such reviews of other funding recipients.[169]

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[168] *See* p. 335.

**Recommendation:** FHEO must conduct onsite compliance reviews of all grant recipients' facilities on a rotating basis, at least once every 3 years. However, FHEO must conduct immediate reviews of recipients identified to be in noncompliance by FHEO's postaward desk-audit reviews. FHEO should ensure in each of its onsite compliance reviews that: 1) the recipient's facility is investigated thoroughly to identify potentially discriminatory housing patterns or potentially discriminatory service practices, such as segregated housing facilities; 2) funding recipient officials, communities affected by the recipient's programs or activities, program participants or beneficiaries, and interviewers responsible for assisting applicants' participation are interviewed; 3) compliance policies and practices are ascertained and examined carefully; 4) statistical evidence on participation rates, as well as statistical evidence on application rejection rates, is examined; 5) applications, or other interview materials, for assistance are examined to detect possible barriers to participation (for instance, discriminatory acceptance criteria—either intentional or in effect—such as requiring particular types of tenancy histories or references that inherently would not apply to low-income or "homeless" applicants); and 6) the recipient's efforts to educate the public and affected community of programs and activities are evaluated, especially efforts to provide program accessibility information to limited-English-proficient communities or otherwise disadvantaged communities. Each review must be designed to fit the particular type of program at issue. To effectuate a comprehensive compliance review system, FHEO staff assigned to conduct such reviews must be trained to conduct onsite investigations. If necessary, several of these procedures involving the examination of documentary material could be accomplished by a thorough postaward desk-audit investigation.

### Complaint Investigations

**Finding:** HUD's complaint workload is dominated by fair housing complaints; HUD receives few Title VI complaints. The low number of Title VI complaints received by HUD could reflect that HUD's outreach and education is insufficient.[170]

**Recommendation:** FHEO needs to increase its public education about Title VI's nondiscrimination requirement and the rights afforded Federal funding program participants and beneficiaries. Otherwise, potential and actual participants and beneficiaries will not be informed adequately of their rights to pursue and protect those rights by filing complaints against HUD funding recipients with FHEO.

### Deficiencies, Remedies, and Sanctions

**Finding:** In 1992 and 1993, HUD did not execute any Title VI administrative proceedings or enforcement actions (although HUD did take action in several other instances involving other Federal statutes governing federally assisted programs). However, since early 1994, partly in response to lawsuits filed against HUD by plaintiffs alleging violations of Title VI, HUD has become more active in seeking to compel recipient public housing authorities to achieve compliance with Title VI.[171]

**Recommendation:** FHEO needs to increase its public education about Title VI's nondiscrimination requirement to ensure that potential and actual funding program and activity participants and beneficiaries understand the rights afforded them by Title VI and know how to protect and pursue those rights by filing complaints with HUD based upon funding recipients' discriminatory practices. Otherwise, discriminatory program policies and practices that violate Title VI will not be redressed. In addition, FHEO should evaluate its postaward compliance review process

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[169] *See* pp. 335–36.

[170] *See* p. 336.

[171] *See* pp. 336–37.

(both onsite and desk-audit reviews) to ensure that it is discovering recipients that operate programs and activities that are in violation of Title VI.

### Outreach and Education

**Finding:** FHEO performs little community outreach and public education related to Title VI. However, FHEO has recently developed a Title VI "fact sheet" for public dissemination. In addition, FHEO developed a Title VI educational program for one of its recipient public housing authorities.[172]

**Recommendation:** Regarding community outreach, FHEO needs regularly to solicit comments and suggestions from affected communities and funding recipients about its Title VI enforcement efforts. It also should solicit information on affected communities' civil rights concerns about protection of Title VI rights and funding recipients' compliance concerns about potential Title VI violations and the agency's compliance expectations. Regarding public education, FHEO needs actively and regularly to inform potential and actual participants, beneficiaries, and affected communities concerning the extent of their rights and how to pursue and protect their rights, including procedures for filing complaints. FHEO also should ensure that recipients educate the public about program accessibility. As part of its outreach and education efforts, FHEO should use its fair housing initiatives program (FHIP) as a model. That program provides funds to community groups and fair housing agencies for a variety of outreach and education activities, including media campaigns to inform the public of their rights under fair housing laws and distributing educational materials and offering seminars on fair housing laws.

### Technical Assistance

**Finding:** Although FHEO devotes some resources to conducting technical assistance seminars for recipients, these programs recently have not focused on Title VI issues. However, HUD recently has implemented several plans aimed at increasing technical assistance for field office external civil rights staff.[173]

**Recommendation:** FHEO should train its staff and recipients' staff regularly concerning the methods for achieving enforcement (step-by-step instruction on conducting procedures, such as compliance reviews) and new and developing civil rights issues, especially changing case law, statutes, regulations, and policies, affecting Title VI enforcement in HUD grant programs.

## Oversight of Continuing State and Local Programs

**Finding:** HUD has not instituted a uniform system of monitoring and evaluating the Title VI compliance efforts of State recipients in State and locally administered programs, such as its community development block grant program.[174]

**Recommendation:** FHEO must establish a systematic oversight and monitoring program to evaluate the Title VI compliance policies and activities connected with *all* programs and activities administered at the State and local levels. First, States and local governments must submit methods of administration demonstrating how they intend to ensure recipient compliance with Title VI. That document must include, but should not be limited to, the following: 1) a specific public outreach and education plan for notifying subrecipients of Title VI compliance requirements; 2) a training program for State and local program staff, subrecipients, and beneficiaries regarding HUD's nondiscrimination policies and procedures; 3) procedures for processing complaints, notifying the funding agency, and informing beneficiaries of their rights; 4) a program assessing and reporting periodically on the status of Title VI compliance that involves more than merely a checklist of activities and assurances; and 5) detailed plans for bringing discriminatory programs into compliance. Such assurances are particularly important when the State or locality is responsible for conducting compliance mechanisms, such as preaward reviews, investigating complaints, reviewing and evaluating subrecipients' self-assessments, and conducting compliance reviews. Second, FHEO should conduct reviews of the Title VI compliance policies and activities of States and local governments regularly to evaluate how they are applying their methods of administration. Such reviews should entail a comprehensive evaluation of the States Title VI enforcement performance. Third, FHEO also should systematically monitor and oversee States' and local agencies' data collection and analysis program. Just as Federal funding agencies are required by the Department of Justice to collect and maintain data on their direct recipients, State and local primary recipients must collect and maintain data on their potential and actual subrecipients, beneficiaries, and affected communities. It is the Federal agency's role to monitor this data collection process and ensure that States and local agencies are maintaining sufficient records. Finally, FHEO should also regularly provide technical assistance and other guidance to States and local agencies to facilitate their Title VI enforcement efforts. Such assistance could involve instruction concerning methods for achieving enforcement (step-by-step instruction on procedures, such as compliance reviews), and new and developing civil rights issues affecting Title VI enforcement, such as changes in statutes, case decisions, regulations, and HUD compliance policies.

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[172] *See* pp. 337–38.

[173] *See* pp. 337–38.

[174] *See* pp. 338–39.

## Staff Training

**Finding:** FHEO trains all new FHEO employees in civil rights compliance and provides civil rights training to regional staff annually. However, only a small proportion of its training specifically relates to Title VI implementation and enforcement responsibilities and activities.[175]

**Recommendation:** FHEO needs to conduct regular formal training of its staff and recipients' staff on issues of Title VI enforcement and compliance, including, but not limited to, the following areas: instruction on conducting enforcement procedures, such as compliance reviews, complaint investigations, and public education; the nexus between Title VI enforcement and a particular funding program's objectives and administration; the nexus between Title VI and other civil rights enforcement provisions relevant to ensuring nondiscrimination in federally funded activities; Title VI nondiscrimination requirements in particular types of HUD programs; and updates on revisions in HUD's policy, case law, statutes, and regulations affecting Title VI enforcement and compliance.

## Reporting Requirements and Data Collection and Analysis

**Finding:** HUD has a comprehensive data collection and analysis system. FHEO regularly collects data on the racial and ethnic characteristics of applicants to, participants in, and beneficiaries of all of HUD's funding programs. For HUD's federally assisted housing programs, recorded data include detailed information on each family applying for or receiving public housing, including the number, age, sex, and disability status of family members, race or ethnicity of the household head, sources and amounts of family income, as well as on their program participation. The data are utilized to prepare an annual report to Congress on fair housing and civil rights. They also are used in conducting recipient compliance reviews. To facilitate analysis of the data collected from recipients, HUD has developed a database system (the "CONQUEST Data System") that can provide "demographic and economic data, and a graphic profile, which thematically maps specific demographics at the state, county and [census] tract level" for comparison with recipient data.[176]

**Recommendation:** FHEO's system for collecting and analyzing demographic data of its funding recipients' programs should serve as a model for other agencies subject to Title VI requirements.

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[175] *See* p. 339.

[176] *See* pp. 339–40.

## Civil Rights Implementation Plans/Planning and Priorities

**Finding:** HUD's Civil Rights Implementation Plans generally fail to serve as an informational tool for the Department of Justice and as a management and planning tool for HUD. In the plans evaluated, the quality of the goals and objectives sections varied. Although the Department of Justice's guidelines require at least one major objective for each functional category, such as preaward reviews, postaward reviews, and enforcement monitoring, HUD's plans failed to meet this requirement. In addition, the major objectives generally were vague and did not embody criteria for measuring accomplishment. Goals and objectives did not include timeframes for their accomplishment and were not linked to progress reports. They also were not associated with available and projected budgetary constraints, staffing levels, resources, and workload and did not adequately reflect the complex relationship among and between regional, field, and headquarters staff.[177]

**Recommendation:** HUD should follow the Department of Justice's "Guideline on Agency Implementation Plans" in developing its Civil Rights Implementation Plans. In addition, HUD must develop a comprehensive civil rights enforcement plan that incorporates the qualities of its implementation plan, strategic plan, and work plan. The ideal civil rights enforcement plan should embody: specific short-term goals and long-term objectives, specific time frames or deadlines for their accomplishment, specific short-term and long-term strategies for their accomplishment, consideration of both available and projected resources and budget constraints, application of these priorities and plans to each type of funding program administered, application of these priorities and plans to the particular enforcement mechanism for block grant and continuing State and local programs, and consideration of the number of expected complaints or other increase in workload. This enforcement plan should be updated every 3 months and should be adjustable to increases and decreases in actual compliance activities and responsibilities and new or developing civil rights enforcement issues, such as agency initiatives and concerns of recipients, participants, beneficiaries, and affected communities.

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[177] *See* pp. 340–42.

## Chapter 9

# U.S. Department of Labor

The U.S. Department of Labor (DOL) administers 14 federally assisted programs providing assistance of $30.4 billion[1] to approximately 742 direct recipients.[2] DOL has a budget of approximately $2.5 million and a civil rights staff of 31 full-time equivalent positions (FTEs) for enforcement related to DOL's federally assisted and federally conducted programs.[3]

## DOL's Federally Assisted Programs

The Employment and Training Administration operates DOL's three largest federally assisted programs. They are:

- *The Job Training Partnership Act (JTPA)* encompasses several programs that provide funds for job training and placement for the economically disadvantaged, youth, dislocated workers, migrant and seasonal farmworkers, Native Americans, and other workers facing difficulties in gaining employment. Generally, JTPA funds are distributed by means of formula grants through States to service delivery areas across the country and then to the various providers of training. JTPA also provides funds for the Job Corps, which aims to prepare severely disadvantaged youth for stable employment.[4]

- *The United States Employment Service* provides funds for job placement and other employment services for unemployed workers and recruitment services for employers. Employment Service funds are distributed by means of formula grants through State public employment services.[5]

- *The Federal Unemployment Insurance Service* provides income support for the unemployed. DOL funds the administrative costs of State unemployment insurance agencies that administer unemployment insurance programs.[6]

The Occupational Safety and Health Administration, the Veterans' Employment and Training Services, the Mine Safety and Health Administration, the Women's Bureau, and the Bureau of Labor Statistics also administer financial assistance programs.[7]

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[1] Office of Management and Budget and U.S. General Services Administration, *1993 Catalog of Federal Domestic Assistance* (Superintendent of Documents: Washington, D.C., 1993), vol. 1, pp. 396–433 (hereafter cited as *Catalog of Federal Domestic Assistance*).

[2] U.S. Department of Labor, "Fiscal Year 1994 Civil Rights Implementation Plan," Attachment N, Workloed and Performance Data, p. 10 (hereafter cited as DOL FY 1994 Implementation Plan).

[3] U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Labor, Q. 36, p. 26 (hereafter cited as DOL Survey).

[4] DOL FY 1994 Implementation Plan, p. 6; *Catalog of Federal Domestic Assistance*, vol. 1, pp. 402–15.

[5] DOL FY 1994 Implementation Plan, p. 5; *Catalog of Federal Domestic Assistance*, vol. 1, pp. 402–15.

[6] DOL FY 1994 Implementation Plan, p. 5; *Catalog of Federal Domestic Assistance*, vol. 1, pp. 402–15.

[7] DOL FY 1994 Implementation Plan, pp. 8–9; *Catalog of Federal Domestic Assistance*, vol. 1, pp. 396–433.

## Organization, Budget, Staffing, and Workload of DOL's Civil Rights Enforcement Function

### Organization

The office with responsibility for DOL enforcement of Title VI is the Directorate of Civil Rights (DCR). DCR is responsible for both DOL's external and internal civil rights enforcement.[8] It also carries out DOL's responsibilities as a designated agency under the Americans with Disabilities Act of 1990.[9]

DCR is located in the Office of the Assistant Secretary for Administration and Management. The Director of DCR reports to the Assistant Secretary for Administration and Management, who in turn reports to the Secretary of Labor.[10] Aside from legal staff, who are in the Division of Civil Rights in the Office of the Solicitor,[11] DCR's Director has direct authority over all DOL staff engaged in Title VI enforcement.

DCR consists of two offices, each of which is headed by a "Chief": the Office of Equal Employment Opportunity and Affirmative Action, and the Office of Program Compliance and Enforcement (OPCE).[12] The Office of Equal Employment Opportunity and Affirmative Action oversees internal (DOL) civil rights and equal employment opportunity (EEO) matters, such as processing employment-related complaints filed against DOL and managing special emphasis and affirmative action programs within DOL.[13]

OPCE is responsible for all external, recipient-related civil rights activities. It consists of two divisions: the Division of Technical Assistance and Compliance Monitoring, which conducts post-award compliance and technical assistance activities, and the Division of Equal Opportunity Investigations and Enforcement, which processes discrimination complaints filed against recipients.[14] In fiscal year 1994, the Division of Technical Assistance and Compliance Monitoring's staffing consisted of 17 FTEs, and the Division of Equal Opportunity Investigations and Enforcement's consisted of 13 FTEs.[15]

Neither OPCE nor DCR has a policy development unit.[16] Only one person, a senior policy advisor to the Director, is explicitly assigned to policy development. According to DCR staff, this presents a significant problem. Numerous policy issues arise regularly; however, since no specific unit is assigned to address them, staff must handle such issues in an *ad hoc* fashion.[17]

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[8] In addition to Title VI, DCR is responsible for the following civil rights statutes pertaining to federally assisted programs: Section 504 of the Rehabilitation Act of 1973, U.S.C. § 794 (1988 & Supp. V 1993); Title IX of the Education Amendments of 1972, 42 U.S.C. §§ 2000d to 2000d–7 (1988); the Age Discrimination Act of 1975, 42 U.S.C. §§ 6101–6107 (1988); and Sections 164 and 167, of the Job Training Partnership Act of 1982, as amended, Pub. L. 97–300, 96 Stat. 1322 (codified as amended in scattered sections of 29 U.S.C). *See* DOL Survey, Q. 22, p. 16. DCR's internal civil rights responsibilities include enforcing Title VII of the Civil Rights Act of 1964, 42. U.S.C. §§ 2000e–2000e17 (1988 & Supp. V 1993).

[9] 42 U.S.C. §§ 12,101–12,213 (Supp. V 1993).

[10] DOL Survey, Q. 20, p. 16.

[11] DOL FY 1994 Implementation Plan, p. 12.

[12] DOL FY 1994 Implementation Plan, p. 11.

[13] Ibid.

[14] Ibid.

[15] Ibid.

[16] Greg Shaw, Chief, Office of Program Compliance and Enforcement, Directorate of Civil Rights, U.S. Department of Labor; Danetta Fofanah, Division Chief, Division of Technical Assistance and Compliance Monitoring, Directorate of Civil Rights, U.S. Department of Labor; Lynne McGlew, Executive Assistant to the Director, Directorate of Civil Rights, DOL; and Peggy Lewis, Division Chief, Division of Equal Opportunity Investigations and Enforcement, Directorate of Civil Rights, U.S. Department of Labor, interview in Washington, D.C., July 18, 1994, p. 2 (hereafter DCR staff interview).

DCR's regional staff work on Title VII issues only.[18] Although at one time the regional offices housed external civil rights enforcement functions, a major reorganization of DCR in 1986 centralized equal opportunity compliance and enforcement activities for recipients of financial assistance in the headquarters office.[19] Consequently, regional staff are not involved in Title VI enforcement. Each regional office has only one staff person with an average grade of GS-12. DCR staff told the Commission that they did not believe that the regional offices could benefit DOL unless they had the staff and resources to handle all civil rights compliance activities, both internal and external, in their regions.[20]

DOL's organization of all civil rights staff into a single office gives the Director of DCR the authority to ensure the development and implementation of a sound Title VI enforcement program. However, the Director of DCR is three levels removed from the Secretary of Labor, indicating that civil rights issues may lack priority at DOL. Although DCR staff explained that DCR's low position within the department did not impede its dealings with recipients,[21] DCR's Director supports consolidating DOL's civil rights enforcement into a single unit headed by an Assistant Secretary.[22]

As noted in chapter 4, obstacles to effective Title VI enforcement arise when one office has responsibility for both internal and external civil rights enforcement. However, because DCR conducts its internal and external civil rights activities through two separate offices, OPCE and the Office of Equal Employment Opportunity and Affirmative Action, it helps to prevent compromising of external civil rights enforcement for internal civil rights activities.

### Budget, Staffing, and Workload

DOL's appropriation does not earmark an amount for DCR.[23] Rather, DCR is identified as a separate budget allocation in DOL's departmental management appropriation. That allocation includes specific funding for DCR's internal and external civil rights responsibilities, including Title VI.[24]

Unlike most other Federal agencies, DOL provided the Commission with detailed information on how its civil rights enforcement budget was allocated among various activities, shown in table 9.2.[25] Over time, OPCE's expenditures on complaint investigations have increased both absolutely and as a percentage of the total budget, and expenditures on compliance reviews have remained relatively constant. Expenditures on technical assistance decreased dramatically, from $254,000 to $10,000, between 1984 and 1988, and have increased only slightly, to $57,000, since 1988. Expenditures on training, while representing a small portion of OPCE's total budget, have increased in recent years. In particular, expenditures on training increased from $81,000 to $120,000 between 1992 and 1993, because of the enactment of the Job Training Partnership Act Amendments.[26]

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[17] Ibid.

[18] DOL Survey, Q. 37, p. 27.

[19] Annabelle T. Lockhart, Director, Directorate of Civil Rights, U.S. Department of Labor, letter to Frederick D. Isler, Acting Assistant Staff Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, Apr. 10, 1995, enclosures 4 (hereafter cited as Lockhart April 1995 correspondence).

[20] DCR staff interview, p. 2.

[21] Ibid. However, they simultaneously suggested that the Director's level could affect DCR's relations with recipients, because they might not respect the Director's position as one of sufficient authority to enforce compliance. Ibid.

[22] Annabelle T. Lockhart, Director, Directorate of Civil Rights, U.S. Department of Labor, letter to Frederick D. Isler, Acting Assistant Staff Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, Oct. 21, 1994, p. 2 (hereafter cited as Lockhart October 1994 letter). DOL has an Assistant Secretary for each of the following areas: Administration and Management, American Workplace, Employment and Training, Employment Standards, Mine Safety and Health, Occupational Safety and Health, Pension and Welfare Benefits, Public Affairs, Veterans Employment and Training Policy, and Congressional and Intergovernmental Affairs.

[23] DOL Survey, Q. 33, p. 23.

[24] Annabelle Lockhart, Director, Directorate of Civil Rights, U.S. Department of Labor, interview in Washington, D.C., Oct. 19, 1994, p. 3 (hereafter cited as Lockhart interview). *See also* Lockhart April 1995 correspondence, enclosures 2, 3.

DCR's overall budget has increased over time, from approximately $3.5 million in 1981, to $5.0 million in 1993, with most of the increase occurring after 1988.[27] OPCE's budget, on the other hand, decreased from $2.5 million in 1981, to a low of $1.9 million in 1988, before reaching the $2.5 million level again in 1993.[28] OPCE's budget remained at the $2.5 million level in 1994.[29] Hence, as a percentage of DOL's total civil rights budget, the budget for external civil rights enforcement decreased from approximately 70 percent in the early and mid–1980s, to approximately 50 percent in the late 1980s.[30]

DCR's staff also declined during this time period, from 98 in 1981, to 66 in 1988. OPCE's staff size decreased from 66, or approximately two-thirds of all DCR staff, in 1981, to 32, or one-half of DCR's staff, in 1988.[31] In 1993, DCR requested an additional five FTEs to conduct compliance reviews for the JTPA program[32] but only received two.[33] In 1994, OPCE's staff size was 34 FTEs, approximately one-half the staff size in 1981.[34] DOL projected that overall staffing levels would continue to decrease through fiscal year 1999.[35]

Moreover, as DCR and OPCE's resources decreased, its civil rights enforcement workload increased. The enactment of the JTPA in 1982 added several hundred recipients to DCR's responsibilities.[36] DCR's workload also increased with the enactment of the Americans with

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[25] According to the Director of DCR, although there is not a separate budget allocation for Title VI enforcement activities, since the separate budget identified for DCR in DOL's departmental management appropriation provides specific funding for external civil rights activities, staffing and related funding for Title VI enforcement can be readily identified. Lockhart interview, p. 3. *See also* Lockhart April 1995 correspondence, enclosures 2, 3.

[26] DOL Survey, Q. 33, p. 23.

[27] DOL Survey, Q. 33, p. 23. *See also* table 9.1.

[28] DOL Survey, Q. 33, p. 23; table 9.1.

[29] DOL FY 1994 Implementation Plan, p. 12.

[30] DOL Survey, Q. 33, p. 23; table 9.1. According to DCR's Director, this decrease in staff and resources committed to civil rights enforcement in federally financed programs was the result of the reorganization of the external equal opportunity compliance and enforcement responsibilities related to recipients of financial assistance into DOL's national office. According to the Director of DCR, this reorganization improved DCR's enforcement effort by establishing separate compliance reviews and complaint investigation divisions. Prior to this time, staff was assigned to perform both duties. Lockhart April 1995 correspondence, enclosures 2, 4.

[31] DOL Survey, Q. 35, p. 25. *See also* table 9.1.

[32] Lockhart interview, p. 3.

[33] Gregory Shaw, Chief, Office of Program Compliance and Enforcement, Directorate of Civil Rights, U.S. Department of Labor, telephone interview, Nov. 8, 1994 (one page).

[34] DOL FY 1994 Implementation Plan, p. 11.

[35] DOL Survey, Q. 26, p. 19.

[36] DOL Survey, Q. 27, p. 20. However, the number of primary recipients decreased when JTPA replaced CETA. Lockhart April 1995 correspondence, enclosure 2.

## TABLE 9.1
## U.S. Department of Labor Civil Rights Budget and Staffing: 1981–1993*

| | 1981 | 1984 | 1988 | 1992 | 1993 |
|---|---|---|---|---|---|
| Budget | | | | | |
| DCR | $3,465 | $3,874 | $3,634 | $4,534 | $4,9620 |
| OPCE | $2,512 | $2,682 | $1,853 | $2,312 | $2,534 |
| OPCE/DCR | 72% | 69% | 51% | 51% | 51% |
| DCR budget (constant $$) | $4,447 | $3,282 | $3,475 | $3,747 | $4,049 |
| Staff | | | | | |
| DCR | 98 | 78 | 66 | 66 | 68 |
| OPCE | 66 | 56 | 32 | 32 | 34 |
| OPCE/DCR | 67% | 72% | 48% | 48% | 50% |

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*DOL does not maintain data for the years before 1981.

Note: All dollar figures are expressed in thousands. To calculate the constant-dollar figures, the nominal dollar amounts were adjusted using a price index for government services developed by the U.S. Department of Commerce, Bureau of Economic Analysis, as reported in President of the United States, *Economic Report of the President* (Superintendent of Documents: Washington, DC, 1995), table B-3, p. 279. The base year for the price index is 1987.

Source: U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Labor, Q. 33, p. 23; Q. 35, p. 25.

## TABLE 9.2
## Office of Program Compliance and Enforcement Expenditures: 1981–1993*

| | 1981 | | 1984 | | 1988 | | 1992 | | 1993 | |
|---|---|---|---|---|---|---|---|---|---|---|
| | $ | % | $ | % | $ | % | $ | % | $ | % |
| Compliance reviews | 1,432 | 57 | 1,529 | 57 | 1,093 | 59 | 1,225 | 53 | 1,392 | 55 |
| Complaints | 804 | 32 | 858 | 32 | 686 | 37 | 925 | 40 | 962 | 38 |
| Training | 40 | 2 | 41 | 2 | 64 | 3 | 81 | 4 | 120 | 5 |
| Technical assistance | 236 | 9 | 254 | 9 | 10 | 1 | 81 | 4 | 57 | 2 |
| Total | 2,512 | 100 | 2,682 | 100 | 1,853 | 100 | 2,312 | 100 | 2,531 | 100 |

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*DOL does not maintain data for the years before 1981.

Source: U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Labor, Q. 33, p. 23. All dollar figures are in thousands.

Disabilities Act of 1990, since DOL is a designated agency responsible for investigating complaints alleging violation of Title II of the act.[37]

The budget and staffing trends indicate that DCR's allocation of staff and resources to civil rights enforcement for federally assisted and federally conducted programs decreased during the 1980s, but has remained constant since that time. The decrease in OCPE's staffing and budget resources occurred as DCR confronted an increased workload due to the JTPA and the Americans with Disabilities Act. Compared to the overall increase in DCR's budget over time, the trends of OCPE's budget and staff resources suggest a decreasing emphasis on external civil rights enforcement activities, and Title VI in particular, until enactment of JTPA. However, DCR staff indicated that DCR never decided to reduce OPCE resources more than those of the Office of Equal Employment Opportunity and Affirmative Action. Instead, staff reductions resulted from attrition and greater staff turnover in OPCE than in the Office of Equal Employment Opportunity and Affirmative Action.[38]

According to DCR's Director, the decrease in OCPE's staff and resources was attributed to the 1986 reorganization of the external equal opportunity compliance and enforcement responsibilities related to recipients of financial assistance into DOL's national office.[39] The Director of DCR maintains that this reorganization improved DCR's enforcement effort by establishing separate compliance reviews and complaint investigation divisions; previously, staff was assigned to perform both duties.[40]

Over time DCR has made only limited efforts to ensure that DOL has an effective Title VI enforcement program for federally assisted programs. For example, DCR does not conduct any preaward reviews due to lack of staff.[41] It conducted significant numbers of postaward desk-audit reviews in the early 1980s but did not conduct any in 1992 and 1993.[42] Since the early 1980s, the number of onsite reviews declined from 147 in 1981 to 15 in 1993.[43] Therefore, although DCR's 1986 centralization of its external civil rights enforcement staff may have resulted in a more uniform and consistent external equal opportunity monitoring program, in effect, the ensuing reduction in resources and staff made it impossible for DCR to fulfill its obligations to all of its funding programs. As a result of the staff streamlining and downsizing associated with DCR's reorganization, it could only concentrate on ensuring equal opportunity in its JTPA programs. This concentration of staff and resources on JTPA programs may have been directed by the Secretary,[44] but DCR's Director had a responsibility to explain to the Secretary that additional staff and resources would be necessary to avoid abdicating DCR's enforcement responsibility in its other funding programs. In 1993, DCR did request five additional staff for its JTPA-related civil rights activities, but it received only two.

Consequently, with the increased workload due to the focus on JTPA program and the enactment of the Americans with Disabilities Act, existing resources are insufficient for the Title VI enforcement program. It is unclear that DCR has reevaluated the staffing needs for Title VI enforcement in federally assisted and federally conducted programs or engaged in planning to address projections of staff reductions. Since DOL is projecting an overall decrease in staffing levels in the future, the ability of OPCE to enforce Title VI effectively, in addition to responsibilities for JTPA and the Americans with Disabilities Act, is of concern.

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[37] Ibid. *See* Title II, Part A of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12,131–12,134 (Supp. V 1993).

[38] DCR staff interview, p. 2.

[39] Civil rights enforcement of DOL's federally assisted or conducted programs was to be performed on a centralized basis effective October 1986. 1988 was the first year DCR operated with a full staff under the centralized mode. Lockhart April 1995 correspondence, enclosure 4.

[40] Lockhart April 1995 correspondence.

[41] DOL FY 1994 Implementation Plan, p. 15; DOL Survey, Q. 40, p. 29. See p. 362 of this chapter.

[42] DOL Survey, Q. 45, p. 34. See p. 363 of this chapter.

[43] Ibid., Q. 68, p. 44. See pp. 363–64 of this chapter.

[44] *See* Lockhart April 1995 correspondence, enclosure 1.

## Regulations, Guidelines, Policies, and Procedures

DOL's Title VI regulations, guidelines, policies, and procedures, especially those pertaining to the JTPA, are better than those of many other Federal agencies in providing guidance on Title VI enforcement. Overall, they constitute an adequate foundation for DOL's Title VI enforcement program.

### Regulations

DOL has two sets of regulations that implement Title VI. First, DOL issued general Title VI regulations,[45] which apply to all recipients of DOL funds. DOL last revised these general regulations in 1973. Second, DOL promulgated regulations specifically for its JTPA programs.[46] The JTPA regulations implement the nondiscrimination and equal opportunity provisions of the JTPA, including a prohibition against discrimination based on race, color, and national origin, in accordance with Title VI.[47]

DOL's Title VI regulations follow the basic model of the Department of Education's (DOEd) regulations.[48] They allow a finding of discrimination based on disparate impact,[49] and they prohibit employment discrimination, even when the primary purpose of a DOL-funded program is not the provision of employment, if such discrimination harms individuals affected by the program.[50] However, they have several deficiencies. In particular, the regulations do not contain an appendix listing the federally assisted programs to which they apply.[51] Furthermore, they do not list separately State continuing programs, a feature helpful in identifying the programs in which State or local agencies have responsibilities for Title VI compliance and enforcement.

Because DOL has not updated the regulations since 1980, they do not reflect recent Title VI developments. In particular, DOL's regulations do not reflect the amendment to Title VI created by the Civil Rights Restoration Act of 1987.[52] The act amended the definition of "programs or activities" to restore broad coverage for Title VI's nondiscrimination provision.[53] In addition, the legislative history indicates that the act left intact the fund termination remedy available when discrimination is "pinpointed" to the program or activity receiving Federal financial assistance, or when the federally assisted program is "infected" by discrimination elsewhere in the operations of the recipient.[54] Although DOL's Title VI regulations are not inconsistent with the Civil Rights Restoration Act, they lack the clarification that the act offered on these issues of Title VI's coverage and fund termination. This type of clarification is necessary to ensure that applicants, recipients, potential and actual beneficiaries, and the public generally have a clear understanding of the of current state of the law and nondiscrimination protections under Title VI.[55]

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[45] 29 C.F.R. Part 31 (1993).

[46] 29 C.F.R. Part 34 (1993).

[47] *Id*. The Director of DCR contends that the JTPA regulations "apply to virtually all DOL funded programs, since virtually all DOL funded programs receive some JTPA funding." Such programs include: JTPA State economically disadvantaged and dislocated worker programs; National JTPA programs, including Job Corps, the Migrant and Seasonal Farm Worker, Indian and Native American programs, and programs funded through the Veterans Employment and Training; Unemployment Insurance and Employment Service programs; and most Women's Bureau and Senior Community Service programs. Lockhart April 1995 correspondence, enclosure 2.

[48] 34 C.F.R. Part 100 (1993).

[49] 29 C.F.R. §§ 31.3(b)(2),(3) (1993).

[50] *Id*. § 31.3(c).

[51] DCR staff indicated that the lack of policy staff will prevent it from publishing such an appendix in the near future. DCR staff interview, p. 3.

[52] Pub. L. No. 100-259, 102 Stat. 28 (codified as amended at 20 U.S.C. §§ 1681note, 1687, 1687note, 1688, 1688note (1988); 29 U.S.C. §§ 706, 794 (1988 & Supp. 1993); 42 U.S.C. §§ 2000d-4a, 6107 (1988)).

[53] U.S. Congress, Senate, Committee on Labor and Human Resources, *Civil Rights Restoration Act of 1987*, 100th Cong., 2d sess., S. Rep. No. 64, p. 1, *reprinted in* 1988 U.S.C.C.A.N. 3.

### Guidelines, Policies, and Procedures

DOL does not meet the U.S. Department of Justice's requirement that it have Title VI guidelines for each of its federally assisted programs.[56] However, DOL has issued detailed guidance manuals or guidebooks for at least three of its federally assisted programs. For JTPA continuing State programs, DOL has also issued "Guidelines for Meeting the Standards for Methods of Administration," which delineate requirements for States' methods of administration under the JTPA program.[57]

DOL has issued several recent "Guidance Memoranda" for State officials that cover JTPA's information collection and reporting requirements, as well as the use of tests by State employment services for persons with disabilities.[58] DCR has also issued "Equal Opportunity Guidebooks" for the JTPA and for State employment security agencies and a "Jobs Corps Equal Opportunity Handbook."[59] These documents explain the laws administered by DCR, including Title VI. They describe DCR's compliance review and complaint investigation procedures, including an explanation of the data collection and analysis process. They provide some program-specific examples of specific instances of discrimination. They delineate funding recipients' compliance requirements and procedures and provide recommendations for adjusting to future changes in the work force. They also contain explanations of DCR policy concerning certain enforcement issues and appendices setting forth applicable law and policies and recent revisions or promulgations of the same. Specifically, the "Equal Opportunity Guidebook" for the JTPA has a section that discusses and illustrates the implications of the Civil Rights Restoration Act of 1987 on Title VI's coverage. It also provides a helpful clarification of those implications with respect to the JTPA program.[60]

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[54] 1988 U.S.C.C.A.N. at 22. For a further discussion and analysis of the effects of the Civil Rights Restoration Act, see chap. 2, pp. 36–40.

[55] DCR has issued two training manuals, or "Equal Opportunity Guidebooks," for its State Employment Security Agencies and the JTPA, that include an explanation of the Civil Rights Restoration Act of 1987 with respect to with respect to Title VI coverage. *See* Lockhart April 1995 correspondence, enclosures 5, 6. However, these Guidebooks do not address the issue of fund termination and the "infection" theory.

[56] 28 C.F.R. § 42.404 (1993).

[57] U.S. Department of Labor, "Guidelines for Meeting the Standards for Methods of Administration" (no date).

[58] U.S. Department of Labor, Directorate of Civil Rights, Equal Opportunity Letter no. 1, from Annabelle T. Lockhart, Director, to Governors, JTPA Liaisons, JTPA Administrators, Equal Opportunity Officers on "Equal Opportunity Information Collection and Reporting Requirements for Recipients of Financial Assistance under Title II or Title III of the Job Training Partnership Act of 1982, as amended," July 6, 1992; and U.S. Department of Labor, Directorate of Civil Rights, Equal Opportunity Guidance Letter No. 3, from Annabelle T. Lockhart, Director, to Governors, State Employment Security Agency (SESA) Administrators, SESA Equal Opportunity Officers, on "Testing, by State Employment Services, of Persons with Disabilities," May 21, 1993.

[59] Lockhart April 1995 correspondence, enclosures 5, 6, 7.

DCR does not have current Title VI compliance or complaint manuals.[61] Rather, DCR currently communicates standard operating procedures to be followed in processing Title VI complaints and in conducting compliance reviews by issuing directives on specific topics.[62] DOL also uses training materials developed for the States as a Title VI complaints manual.[63] DCR staff indicated that they are working on a compliance manual and a complaints manual, which will replace these documents within the next several years.[64]

## Process of Title VI Enforcement

DOL provides most of its Federal financial assistance to beneficiaries through continuing State-administered programs. Generally, DOL's

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[60] Ibid., enclosure 5, p. ix.

[61] Bud West, Senior Policy Analyst, Directorate of Civil Rights, U.S. Department of Labor, telephone interview, Mar. 24, 1994. DCR indicated that in cooperation with DCR, Job Corps has issued equal opportunity standards for Job Corps Centers and that DOL's Employment and Training Administration has issued guidance on the processing of complaints alleging discrimination. Cynthia A. Metzler, Assistant Secretary for Administration and Management, U.S. Department of Labor, letter to Mary F. Berry, Chairperson, U.S. Commission on Civil Rights, May 1, 1995, enclosure 1 (hereafter cited as Metzler May 1995 letter).

[62] These include: Noelia Fernandez, Acting Division Chief, Division of Technical Assistance and Compliance Monitoring, DOL, Memorandum for DTACM Staff on Data Analyses, DTACM Bulletin #90–6, Apr. 6, 1990; Donald J. Kulick, Administrator, Office of Regional Management, DOL, Memorandum to State Employment Security Agencies on Employment Service Discrimination Compliant Processing, Apr. 30, 1991; Bud West, Chief, Division of Technical Assistance and Compliance Monitoring, DOL, Memorandum for DTACM Staff on onsite JTPA reviews, DTACM Memorandum No. 91–10, Dec. 6, 1991; Peggy B. Lewis, Chief, Division of Equal Opportunity Investigations and Enforcement, Memorandum for Division of Equal Opportunity Investigations and Enforcement Staff, on Operating Procedures for Processing Title VI Complaints, Nov. 19, 1990; Annabelle T. Lockhart, Director, Directorate of Civil Rights, DOL, Memorandum for DTACM Staff on Compliance Review Case Files, DTACM Policy Memorandum no. 2, Nov. 9, 1990; Bud West, Acting Chief, Division of Technical Assistance and Compliance Monitoring, DOL, Memorandum to Division of Technical Assistance and Compliance Monitoring Staff on Processing Review Backlog, DTACM Bulletin #90–7, May 3, 1990; Bud West, Chief, Division of Technical Assistance and Compliance Monitoring, DOL, Memorandum to Division of Technical Assistance and Compliance Monitoring Staff, providing guidance to be taken into consideration when conducting reviews and writing reports and correspondence, DTACM Memorandum no. 91–3, Feb. 8, 1992; Bud West, Chief, Division of Technical Assistance and Compliance Monitoring, DOL, Memorandum to Division of Technical Assistance and Compliance Monitoring Staff on Notification Letters for JTPA Compliance Reviews, DTACM Memorandum no. 91–8, February 1991; Bud West, Chief, Division of Technical Assistance and Compliance Monitoring, Memorandum to Division of Technical Assistance and Compliance Monitoring Staff, on Correspondence Control, DTACM Memorandum No. 91–9, December 1991; Bud West, Chief, Division of Technical Assistance and Compliance Monitoring, DOL, Memorandum to Division of Technical Assistance and Compliance Monitoring Staff, on Revised Report of Findings, DTACM Memorandum no. 92–3, 3; Bud West, Chief, Division of Technical Assistance and Compliance Monitoring, DOL, Memorandum to Division of Technical Assistance and Compliance Monitoring Staff, on Language for Letters of Finding—Interim Procedures, DTACM Memorandum No. 92–6, Dec. 4, 1992; Bud West, Chief, Division of Technical Assistance and Compliance Monitoring, DOL, Memorandum to Division of Technical Assistance and Compliance Monitoring Staff, on Model Conciliation Agreement, DTACM Memorandum no. 93–2, Apr. 21, 1993; Bud West, Chief, Division of Technical Assistance and Compliance Monitoring, DOL, Memorandum to Division of Technical Assistance and Compliance Monitoring Staff, on Revised Report of Findings, Part D, DTACM Memorandum No. 93–4, June 17, 1993.

[63] DOL FY 1994 Implementation Plan, p. 15.

[64] DCR staff interview, p. 4.

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TABLE 9.3
U.S. Department of Labor's Title VI Enforcement Activity:
Preaward Reviews, Postaward Reviews, and Complaints Received—1981–1993*

| | 1981 | 1984 | 1988 | 1992 | 1993 |
|---|---|---|---|---|---|
| Preaward reviews | 581 | 30 | 0 | 0 | 0 |
| Postaward reviews | | | | | |
| Desk-audit | 325 | 88 | 38 | 0 | 0 |
| Onsite | 147 | 96 | 36 | 26 | 15 |
| Complaints | | | | | |
| All civil rights | 1,350 | 437 | 1,272 | 1,789 | 1,711 |
| Title VI | N/A | N/A | 577 | 96 | 84 |

*DOL does not maintain data for the years before 1981.
Source: U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Labor, Q. 41(e), p. 30; Q. 68(c), p. 44; Q. 71, p. 46.

current Title VI enforcement activities focus upon JTPA programs[65] and neglect key activities, such as preaward reviews and community outreach and public education, related to Title VI enforcement in its other federally assisted programs.

### Preaward Reviews

DCR does not conduct any preaward reviews.[66] Instead, the grants-making agencies[67] of DOL are responsible for ensuring that all DOL grants include assurance language. In continuing State programs, States are responsible for performing any preaward reviews and obtaining necessary assurances.[68] In JTPA programs, the JTPA regulations allow DCR to conduct preaward reviews;[69] however, DCR is not conducting such reviews at this time because of lack of staff.[70] DCR does not anticipate performing preaward reviews in the near future.[71]

DCR admits that the grant package "boilerplate" equal opportunity language does not ensure that a program operates in a nondiscriminatory fashion. As such, it relies on onsite compliance reviews. Given DCR's limited staff and resources for Title VI enforcement, the failure to conduct preaward reviews significantly limits

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[65] According to DCR, in 1991, the Secretary of Labor directed DCR to concentrate its compliance review activities exclusively on State JTPA programs. Prior to then, DCR conducted compliance reviews of Job Corps, Employment Service and Unemployment Service programs. At that time, compliance reviews of State JTPA programs were not undertaken. Instead, DCR relied upon the submission of States' methods of administration. In 1990, DCR began to conduct compliance reviews of State JTPA programs to determines States' compliance with their methods of administration. In 1993, DCR's JTPA regulations included the requirement that all continuing State programs submit methods of administration. Lockhart April 1995 correspondence, enclosure 2.

[66] DOL FY 1994 Implementation Plan, p. 15; DOL Survey, Q. 40, p. 29. *See also* table 9.3.

[67] Grants-making agencies are any Federal or State agencies that fund programs.

[68] DCR staff interview, p. 4. DCR staff indicated that DOL's grantsmaking agencies devote a significant amount of time to reviewing recipients' annual plans, making sure that all necessary assurances are signed before they release funds.

[69] 29 C.F.R. § 34.40(a) (1993).

[70] Lockhart interview, p. 3.

[71] *See* DOL FY 1994 Implementation Plan, p. 15.

DCR's ability to ensure that DOL's federally funded programs are being operated in a nondiscriminatory manner.

### Postaward Desk-Audit Reviews

Although DCR conducted significant numbers of postaward desk-audit reviews in the early 1980s,[72] it did not conduct any such reviews during fiscal years 1992 and 1993.[73] DCR does conduct desk-audit reviews as a preliminary step in its onsite compliance reviews, and its procedures for these reviews are comprehensive. For example, with notification of a scheduled onsite compliance review, DCR requests State employment security agencies to submit statistical information about applicant data and job referral and placement data for employment services. For its unemployment insurance program, it reviews the numbers of claims processed; monetary determinations made; nonmonetary determinations made, as well as the number of positive and negative nonmonetary determinations made by issue and adjudicator; and total number of lower authority and higher authority appeal decisions by issue. DCR analyzes this data to determine the rate at which each service is provided for each racial and ethnic group and if any differences are statistically significant.[74]

However, DCR does not conduct desk-audit reviews separately or for the purpose of targeting recipients for onsite compliance reviews.[75] Of DOL's 742 direct recipients, it conducted only 15 onsite compliance reviews in 1993.[76] Consequently, DCR reaches few recipients annually through these postaward desk audits. Given DCR's limited resources and its existing comprehensive data collection and analysis system, its failure to use postaward desk-audit reviews as a Title VI enforcement tool independent of onsite compliance reviews reflects inefficient enforcement efforts. Postaward reviews would enable DOL to review relatively large numbers of recipients with comparatively fewer resources.

### Onsite Compliance Reviews

The Division of Technical Assistance and Compliance Monitoring conducts onsite Title VI compliance reviews of recipients for DCR.[77] Currently, the reviews of State and local agency recipients focus on the JTPA program[78] and, consequently, do not adequately cover other DOL-funded programs.

DCR has performed a decreasing number of Title VI compliance reviews. Since the early 1980s, the number of onsite Title VI compliance reviews declined dramatically, from 147 in 1981, to 96 in 1984, to 36 in 1988, and finally to 15 in 1993.[79] DCR staff told the Commission that when DOL was conducting larger numbers of compliance reviews, the quality of those reviews suffered.[80] Staff also indicated that there was no single standard for conducting compliance reviews and that the compliance review manual was 10 years out of date. As a result, OPCE reduced the quantity of reviews and concentrated instead on review quality by developing a structure for conducting them.[81]

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[72] DCR staff explained that the Office of Civil Rights, then part of the Employment and Training Administration, performed the postaward reviews, but that they were not full civil rights audits. DCR staff interview, p. 4. *See also* table 9.3.

[73] DOL Survey, Q. 45, p. 34; table 9.3.

[74] *See* Lockhart April 1995 correspondence, enclosure 6, pp. I–1 to I–3.

[75] *See* Lockhart interview, p. 3.

[76] DOL Survey, Q. 68, p. 44. See discussion below on onsite compliance reviews.

[77] Ibid., Q. 25(e), p. 18.

[78] Ibid., Q. 82(a), p. 54.

Although DOL's onsite compliance reviews previously assessed compliance both at the State and the local level, DOL more recently decided to assess State compliance through evaluating methods of administration submitted to DOL by the States.[82] Therefore, in the future, DOL will conduct onsite compliance reviews only at the local level.[83] These local reviews will include an evaluation of State-level policies as implemented at the local level, as well as their effect upon program beneficiaries and participants.[84]

### Complaint Investigations

Complaint investigation is the responsibility of the Division of Equal Opportunity Investigations and Enforcement.[85] DOL received an increasing number of civil rights complaints during the past decade—from 437 in 1984 to 1,711 in 1993. However, the number of Title VI complaints received by DOL declined dramatically over time, from 577 in 1988, or almost half of all complaints received that year, to 96 in 1992 and to 84 in 1993, or roughly 5 percent of all complaints received.[86] DCR staff explained that DOL receives so few Title VI complaints because most of them are relatively easy to resolve and are often resolved at the State level.[87]

In January 1992, DOL established a complaint intake unit consisting of three staff members. DOL projects that the complaint intake unit, as well as a new complaint tracking system, will improve DOL's complaint processing in the future.[88]

### Deficiencies, Remedies, and Sanctions

DCR generally encourages recipients to comply voluntarily with Title VI when DCR determines that a recipient is in noncompliance.[89] Consequently, DOL generally makes few formal findings of noncompliance with Title VI, and it is not actively seeking remedies or imposing sanctions on recipients in noncompliance.

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[79] Ibid., Q. 68, p. 44. According to DCR's director, the relatively small number of reviews conducted in 1993 was the direct result of the issuance of DCR's JTPA equal opportunity regulations. During that year, DCR concentrated on training State Equal Opportunity Officers of State JTPA programs in the preparation of State Methods of Administration. The last four months was devoted exclusively to the evaluation of the Methods of Administration received. Lockhart April 1995 correspondence, enclosure 2.

[80] DCR staff interview, p. 4.

[81] Ibid.

[82] DOL FY 1994 Implementation Plan, p. 16. *See* discussion below, pp. 366–68.

[83] Ibid.

[84] Lockhart April 1995 correspondence.

[85] DOL Survey, Q. 25(j), p. 19.

[86] Ibid., Q. 71, p. 46; table 9.3. DOL did not report the number of Title VI complaints received in 1984.

[87] DCR staff interview, p. 5. DCR's Director added that because the majority of DOL recipients receive some JTPA funds, "virtually all of the jurisdictional complaints received by DCR allege a violation of the nondiscrimination provisions of the JTPA." Lockhart April 1995 correspondence, enclosure 2.

[88] DOL FY 1994 Implementation Plan, p. 14.

[89] Lockhart interview, p. 3. In 1991, DCR implemented the use of conciliation agreements in all cases of noncompliance. Lockhart April 1995 correspondence, enclosure 2.

Since 1988, DCR has not found any of its recipients in noncompliance based on its Title VI compliance reviews, although it determined that some recipients had committed technical violations which they later corrected.[90] Technical violations included programmatic deficiencies in discrimination complaint processing procedures and in notification to applicants and beneficiaries of their Title VI rights, including their right to file a complaint of discrimination. Technical violations also encompassed improper placement of DCR's posters.[91]

DCR does not maintain separate records about the methods for closing Title VI cases and imposing sanctions. However, among all federally assisted and federally conducted complaint investigations, few resulted in a cause finding.[92] DCR has never imposed sanctions in any of its federally assisted or federally conducted programs, including Title VI. Furthermore, it has only had one case in litigation, a Title VI case litigated in the 1980s.[93]

In many cases, encouraging voluntary compliance may lead to the best possible resolution of a compliance problem. However, when a recipient has committed a serious Title VI violation, negotiating and enforcing a conciliation agreement may be necessary to ensure compliance with Title VI. Thus, DCR's strategy of emphasizing voluntary compliance to the exclusion of other strategies could result in deficient Title VI enforcement.

### Outreach and Education

Although the Office of the Director, the Division of Technical Assistance and Compliance Monitoring, and the Division of Equal Opportunity Investigations and Enforcement each has outreach and education responsibilities related to the enforcement of Title VI,[94] DCR generally delegates such activities to recipients.[95] According to DCR staff, DCR has no direct interaction with community and advocacy groups. However, some of these groups attend training seminars that DCR conducts for its State recipients.[96]

The JTPA regulations specifically give recipients the responsibility of disseminating JTPA's nondiscrimination policy to actual and potential participants and beneficiaries.[97] Unlike the general Title VI regulations, the JTPA regulations extensively detail how such dissemination should occur, including requirements for dissemination to persons with limited English proficiency.[98] According to DCR staff, DCR actively ensures that its State JTPA recipients inform applicants, participants, and beneficiaries of their rights under Title VI and other Federal civil rights statutes. For example, it requires such recipients to include civil rights complaint information in all program literature and to display posters.[99]

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[90] DOL Survey, Q. 68(d),(e), p. 44.

[91] Ibid., Q. 67, p. 43.

[92] Ibid., Q. 73, p. 47.

[93] Ibid., Qs. 79, 80, pp. 51, 52.

[94] DOL Survey, Q. 25(h), p. 18.

[95] *See* Ibid., Qs. 46–48, p. 35.

[96] DCR staff interview, p. 5.

[97] 29 C.F.R. § 34.23 (1993).

[98] *Id.* DCR's Director indicated that DOL relies on the U.S. Department of Justice's coordination regulations, 28 C.F.R. § 42.405(d)(1) (1993), to ensure that recipients of DOL funds in other DOL programs meet the needs of limited-English-proficient participants and beneficiaries. Lockhart interview, p. 1.

[99] DCR staff interview, p. 5.

### Technical Assistance

The Division of Technical Assistance and Compliance Monitoring is responsible for providing technical assistance to funding recipients' staff, primarily State and local agency officials.[100] The scope and amount of training provided such recipients is noteworthy. DCR has provided its funding recipients with considerable information, generally thorough training and participation in conferences, concerning compliance with Title VI.[101] Since 1986 training programs have been delivered to the equal opportunity officers responsible for administering Jobs Corps, Employment Service, unemployment insurance, and State JTPA programs. For example, in 1993, DCR trained unemployment insurance and JTPA State officers to conduct methods of administration.[102] Recently, such technical assistance has focused on the nondiscrimination and equal opportunity provisions of the JTPA.[103]

DCR generally provides technical assistance upon request and works regularly with the Equal Opportunity Committee of the Interstate Conference of Employment Security Agencies.[104] DCR also conducts training seminars for State and local agency staff on an "as needed/requested basis" on such topics as data collection and analysis, onsite compliance reviews, complaint processing, disability issues, sexual harassment, and resolution of noncompliance.[105] DCR conducts an annual national conference held in Washington, D.C., and offers 1-day presentations regarding specific aspects of compliance.[106] For example, DCR has provided training to State JTPA and employment services, and unemployment insurance equal opportunity officers on new regulations implementing the nondiscrimination and equal opportunity provisions of the JTPA.[107]

## Oversight of Continuing State Programs

As noted above, DOL distributes most of its Federal financial assistance through continuing State programs. DCR's oversight of continuing State programs currently focuses on States' JTPA programs and, to a lesser extent, other Employment and Training Administration programs. DCR decided in the late 1980s to rely on States to ensure compliance with Title VI in these programs.[108]

As a means of monitoring compliance in continuing State programs, DOL's regulations require each State to provide a statement that it is in compliance with Title VI and to develop methods of administration showing how the State will ensure that it and all subrecipients are in compliance with Title VI.[109] These measures allow DCR to oversee effectively State recipients' compliance enforcement of subrecipients and to provide technical assistance to States as necessary.[110] Staff indicated that DOL only recently began to oversee the State compliance programs to ensure that the States are fulfilling their responsibilities.[111] Specifically, staff mentioned that DOL never evaluated methods of administration as a means of monitoring States' enforcement efforts until 1993, when the JTPA regulations and guidelines were promulgated.[112]

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[100] DOL Survey, Qs. 25(g),51, 53, pp. 18,36,37.

[101] Lockhart April 1995 correspondence, enclosure 2.

[102] Ibid.

[103] DOL Survey, Qs. 25(g), 51, 53, pp. 18, 36, 37.

[104] Ibid., Q. 53, p. 37.

[105] Ibid., Q. 51, p. 36; DOL FY 1994 Implementation Plan, p. 19.

[106] DOL Survey, Q. 39, p. 29. *See also* DOL FY 1994 Implementation Plan, p. 19.

[107] DOL Survey, Q. 51, p. 36. *See also* DOL FY 1994 Implementation Plan, p. 19.

[108] DCR staff interview, p. 5. *See also* DOL FY 1994 Implementation Plan, p. 16. The basis for such decision was that at that time most of DOL's financial assistance was also being distributed through continuing State programs. Lockhart interview, p. 2.

DOL's JTPA regulations are more specific about States' requirements. They give the State's Governor responsibility for "oversight of all JTPA-funded State programs, . . . [including] ensuring compliance with the nondiscrimination and equal opportunity provisions of JTPA . . . and negotiating with the recipient to secure voluntary compliance when noncompliance is found."[113]

To carry out these responsibilities, States must designate an equal opportunity officer, who must report directly to the State JTPA director.[114] The equal opportunity officer must receive "sufficient staff and resources . . . to ensure compliance with the nondiscrimination and equal opportunity provisions of JTPA" and may be required to undergo training at the State's expense.[115] According to DOL, the equal opportunity officer:

> serves as a liaison with DCR and through them, DCR is able to communicate compliance standards. The EO Officers do not act on behalf of DCR. For example, while they may conduct EO audits and complaint investigations, their activities or findings do not affect DCR's ability to conduct reviews or investigations, nor is DCR obliged to accept a State's determination. The EO Officers are very useful to DCR in many ways. Most importantly, they establish a presence in their States. Given DCR's limited resources, this is very important to DCR in our efforts to effectively enforce Title VI.[116]

Given the limited resources for civil rights enforcement at the Federal level, the JTPA regulations' requirement that States bear the expense of training their equal opportunity staff and provide sufficient staff and resources for the equal opportunity officer is a meaningful provision. Such a provision is not present in the Title VI regulations of other Federal agencies.

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[109] 29 C.F.R. § 31.6(b) (1993).

[110] Lockhart interview, p. 2.

[111] DCR staff interview, p. 6.

[112] Ibid. DCR's Director contends that, in 1984, DCR developed standards for and trained States' staff in the development of methods of administration for JTPA programs. These methods of administration were submitted and evaluated. In 1989, DCR began conducting compliance reviews of each State to determine the extent to which each complied with their methods of administration. Between 1989 and 1993, each State was reviewed. In 1993, submission of methods of administration for review and evaluation was made a requirement for all continuing State programs funded by DOL, rather than only JTPA-related programs. Since August 1993, DCR compliance staff have been evaluating these documents. Lockhart April 1995 correspondence, enclosure 2. However, no evidence was provided to support this statement.

[113] *Id.* § 34.32(a). While the requirement that States submit methods of administration for evaluation of their compliance status applies only to State JTPA, unemployment insurance, and Employment Service programs, all other Title VI compliance requirements, such as appointing an equal opportunity officer and following compliant procedures, apply to all recipients funded in whole or in part through JTPA. Lockhart April 1995 correspondence, enclosure 2.

[114] According to DCR's Director, DOL requires the equal opportunity officer to report to the highest ranking person in the recipient's organization. Lockhart interview, p. 2.

[115] 29 C.F.R. § 34.22(b) (1993).

[116] DOL Survey, Q. 82(d), p. 54.

DCR requires that States designate equal opportunity officers, not only for the JTPA program, but for each DOL-funded program.[117] DCR has devoted considerable attention to training the State equal opportunity officers on their responsibilities. DCR staff indicated that no conflict of interest resulted from placing compliance responsibilities on the States, because the equal opportunity officers typically functioned independently of the State offices receiving funds. DCR staff also suggested that State officers could better effect subrecipient compliance than DCR staff because they held organizational positions within the State government.[118]

The JTPA regulations also provide detailed instructions about the States' methods of administration for the JTPA. The methods of administration must be written and updated periodically and must include the following elements:

- a compliance review system;
- a preaward review system;
- procedures for ensuring program accessibility to persons with disabilities;
- a training system for recipients;
- procedures for obtaining corrective action and imposing sanctions; and
- supporting documentation.[119]

DOL provides detailed guidelines to help States meet the JTPA regulations' standards for the methods of administration. These guidelines specify that a methods of administration should include the following nine elements, with a narrative and documentation accompanying each element:

- Designate of State and Service Delivery Area Equal Opportunity Officers;
- Communicate equal opportunity policy, and train staff to carry it out;
- Review all agreements for equal opportunity provisions, and include a nondiscrimination assurance;
- Make efforts to provide equitable services among substantial segments of the population;
- Provide program and site access to those with disabilities;
- Perform data collection, record keeping and reporting;
- Monitor recipients for compliance;
- Handle discrimination complaints; and
- Obtain corrective actions or apply sanctions for discrimination.[120]

DCR currently requires States to submit methods of administration for all State Employment and Training Administration programs (JTPA, Employment Service, and unemployment insurance). In fiscal year 1994, DCR concentrated on ensuring that States submitted their methods of administration and on reviewing those methods of administration. The methods of administration were due to DCR on August 14, 1993. In October 1993, DCR mailed letters to States that had not yet submitted them. The letters informed such States that if they did not submit the methods of administration promptly, DCR would issue a letter indicating that the States were in violation of Title VI regulations. DCR completed its first review in May 1994 and issued its first letter of noncompliance to a Governor in June 1994.[121]

## Staff Training

DOL's staff training program is among the best of the Federal agencies evaluated in this report. DOL conducts ongoing training for its civil rights enforcement staff, which is the responsibility of the DCR training officer in the Office of the Director.[122] DOL's Civil Rights Implementation Plans state that staff training is an agency priority.[123] DOL's expenditures on training have increased steadily since 1988.[124]

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[117] DCR staff interview, p. 6. The Title VI regulations do not give authority for this requirement. Before the JTPA regulations were issued, DCR used the section 504 regulations to impose this requirement. Lockhart interview. Lockhart interview, p. 2.

[118] DCR staff interview.

[119] 29 C.F.R. § 34.33 (1993).

[120] U.S. Department of Labor, "Guidelines for Meeting the Standards for Methods of Administration (MOA) Title 29 C.F.R. Part 34" (no date).

[121] DCR staff interview, p. 6.

All new DCR employees receive training in civil rights compliance.[125] Furthermore, all DCR staff received a moderate amount of training each year, between 1989 and 1993, including computer training and instruction on writing and management skills. In each year, staff participated, either as trainees or trainers, in DCR's training seminars for Job Corps, JTPA, and Employment Service/Unemployment Service recipient staff.[126] In 1991 all staff participated in a series of briefings on each of DOL's federally funded programs to allow them to become familiar with each program. That same year, all Division of Technical Assistance and Compliance Monitoring staff received training on methods for conducting onsite reviews.[127] All civil rights staff responsible for federally assisted programs had training on JTPA in fiscal years 1990 and 1993 and on the Americans with Disabilities Act in fiscal year 1992. However, DOL never conducted training specifically on Title VI.[128]

## Data Collection and Analysis

DOL's JTPA data collection and analysis system is comprehensive. It is an excellent model of an information collection and analysis system that facilitates and effects Title VI compliance. JTPA's regulations provide considerable detail on the nature of data required of JTPA recipients. Specifically, the regulations provide:

> Such records shall include, but are not limited to, records on applicants, eligible applicants, participants, terminees, employees and applicants for employment. Each recipient shall record the race/ethnicity, sex, age, and where known, disability status, of every applicant, eligible applicant, participant, terminee, applicant for employment and employee.[129]

Furthermore, the regulations require grant applicants and recipients to report any administrative enforcement actions or other legal actions against them which allege discrimination. The regulations also require such applicants and recipients to report any findings of noncompliance by other Federal agencies that conduct compliance reviews. All applicants and recipients must maintain a record of discrimination complaints received. Finally, DCR may require recipients and grant applicants to furnish other information at the Director's discretion.[130] Governors are responsible for ensuring that recipients collect and maintain this data.[131]

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[122] DOL Survey, Q. 25(i), p. 19.

[123] U.S Department of Labor, "Fiscal Year 1990 Civil Rights Implementation Plan," pp. 21–2 (hereafter cited as DOL FY 1990 Implementation Plan); U.S. Department of Labor, "Fiscal Year 1991 Civil Rights Implementation Plan," p. 22 (hereafter cited as DOL FY 1991 Implementation Plan); U.S. Department of Labor, "Fiscal Year 1992 Civil Rights Implementation Plan," p. 21 (hereafter cited as DOL FY 1992 Implementation Plan); U.S Department of Labor, "Fiscal Year 1993 Civil Rights Implementation Plan," section II.E.5 (hereafter cited as DOL FY 1993 Implementation Plan); DOL FY 1994 Implementation Plan, p. 26.

[124] DOL Survey, Q. 33, p. 23. *See also* table 10.2.

[125] DOL Survey, Q. 49, p. 36.

[126] DOL FY 1990 Implementation Plan, pp. 21–22; DOL FY 1991 Implementation Plan, p. 22; DOL FY 1992 Implementation Plan, p. 21; DOL FY 1993 Implementation Plan, section II.E.5 (no page number); DOL FY 1994 Implementation Plan, p. 26.

[127] DOL FY 1992 Implementation Plan, p. 21.

[128] *See* DOL FY 1990 Implementation Plan, pp. 21–22; DOL FY 1991 Implementation Plan, p. 22; DOL FY 1992 Implementation Plan, p. 21; DOL FY 1993 Implementation Plan, section II.E.5 (no page number); DOL FY 1994 Implementation Plan, p. 26.

[129] 29 C.F.R. § 34.24(a)(2) (1993).

[130] *Id.* § 34.24(a)(3)–(6).

In 1992, DOL announced a mandatory reporting system, entitled the Standardized Program Information Record (SPIR), for recipients of JTPA funds.[132] Under the system, developed jointly by DCR and the Employment and Training Administration, States must ensure that service delivery areas collect data on each JTPA applicant and participant.[133] These data include the following information:

- State and Service Delivery Area;
- Social Security number;
- date of application;
- date of birth;
- gender and race/ethnicity;
- disability status;
- date of eligibility determination; and
- specific program eligibility.[134]

Those who become participants additionally must supply the following:

- date of participation;
- title of participation;
- concurrent participation;
- economically disadvantaged;
- public assistance recipiency status;
- family status;
- number of dependents;
- highest school grade completed;
- school enrollment status, including whether part-time or full-time;
- veteran status;
- labor force status;
- number of weeks unemployed during prior 26 weeks;
- unemployment compensation status;
- pre-program wage;
- reading skills grade level;
- math skills grade level;
- JOBS program participant; and
- additional barriers to employment, including limited English proficiency.[135]

States must report these data to DOL for all JTPA participants, but not necessarily for all applicants.

When the Employment and Training Administration created the SPIR system, it only intended to collect data on participants.[136] However, since DCR was already requiring data on applicants and participants from recipients, DOL instructed the Employment and Training Administration and DCR to merge their data collection systems,[137] and DCR insisted that applicants be added to the data base.[138] Although DCR does not require States to maintain applicant data on a computer database, it urges States to do so by indicating that DCR will request the data during any compliance reviews. As a result, most States are recording the data on computers.[139]

The SPIR database allows DCR to conduct analyses at the State and the service delivery area levels to determine where significant statistical disparities exist. It also allows DCR to guide the selection of service delivery areas for compliance reviews. Furthermore, DCR staff can use the database to conduct indepth analyses of individual records during a compliance review.[140] According to DCR's Director:

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[131] *Id.* § 34.31.

[132] 57 Fed. Reg. 219 (1992). The reporting system applies to programs funded under Title II–A, Title II–C, and Title III of the JTPA.

[133] *Id.*

[134] *Id.* at 53830.

[135] *Id.* at 53830–53832.

[136] DCR staff interview. The "P" originally stood for "Participant;" now it stands for "Program."

[137] Ibid.

[138] Ibid.

[139] Ibid.

> Using the SPIR data base will improve not only DCR's ability to focus on those Service Delivery Areas that are more in need of review, but also our ability to identify areas of potential discrimination within those Service Delivery Areas. It will also make DCR more efficient by allowing more work to be done during the desk review phase of the review.[141]

Unfortunately, unlike the Employment and Training Administration, DCR does not have the data available to it online. It can only gather the necessary data during the course of a compliance review.[142] However, it provides DCR with an abundant amount of information that can be utilized significantly in desk-audit reviews and to guide the selection of onsite compliance reviews.

For non-JTPA programs, DCR requires recipients to report data only during compliance reviews.[143] DOL's Title VI regulations require that each recipient maintain data so that DOL may determine whether the recipient is in compliance with Title VI.[144] The regulations provide few details on the nature of data recipients should keep. Beyond requiring that recipients maintain the data in such form as the Secretary of the Department of Labor deems necessary, the regulations provide that "[i]n general, recipients should have available . . . data showing the extent to which members of minority groups are beneficiaries of federally assisted programs."[145]

Although the Title VI regulations do not require detailed reporting similar to that required by the JTPA regulations, DOL does collect similar data on recipients of other DOL-funded programs, including the Employment Service, unemployment insurance, and Job Corps.[146]

## Civil Rights Implementation Plans

The Commission reviewed DOL's Civil Rights Implementation Plans for 1990–1993.[147] The 1990 Implementation Plan was a base-year plan covering the period 1990–1993, and the 1991–1993 plans were updates of the 1990 plan. Generally, the plans provided a detailed description of DOL's Title VI enforcement program. However, the plans did not function, as the Department of Justice requires,[148] as a planning tool for DOL.

The 1990 plan specified two long-range goals:

> 1) To strengthen the capability of DOL recipients to meet their civil rights obligations by publicizing, communicating, and interpreting the requirements,

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[140] Annabelle T. Lockhart, Director, Directorate of Civil Rights, U.S. Department of Labor, letter to Frederick D. Isler, Deputy Assistant Staff Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, May 3, 1994.

[141] Ibid.

[142] DCR staff interview, p. 7.

[143] DOL Survey, Qs. 61, 62, p. 40.

[144] 29 C.F.R. § 31.5(b) (1993).

[145] *Id.*

[146] *See* Lockhart October 1994 letter, p. 1; U.S. Department of Labor, Employment and Training Administration, Employment Service Program Letter No. 14–89 to All State Employment Security Agencies, "Equal Opportunity Data Requirements for Employment Service," May 4, 1989; U.S. Department of Labor, Employment and Training Administration, Unemployment Insurance Program Letter No. 46–89 to All State Employment Security Agencies, "Equal Opportunity (EO) Data requirements for Unemployment Insurance (UI), Aug. 16, 1989.

[147] DOL FY 1990 Implementation Plan; DOL FY 1991 Implementation Plan; DOL FY 1992 Implementation Plan; DOL FY 1993 Implementation Plan; DOL FY 1994 Implementation Plan.

[148] U.S. Department of Justice, "Guideline for Agency Implementation Plans Required by Executive Order 12250, 'Leadership and Coordination of Nondiscrimination Laws'" (no date), p. 9.

> regulations, and guidelines of the statutes for which DCR has responsibility, through training and technical assistance.
>
> 2) To develop comprehensive management systems which can efficiently and consistently identify noncompliance, pursue voluntary resolution, monitor commitments to correct violations, and fully use the authorized powers of enforcement.[149]

The plan also listed four major objectives and five short-term objectives designed to meet the long-range goals. Implementation plans for subsequent years restated the long-range goals, major objectives, and short-term objectives and reported on progress made towards the short-term objectives.[150]

The long-range goals and major and short-term objectives in the 1990 plan followed the format provided by the Department of Justice's guidelines for agencies' implementation plans.[151] Each plan listed specific projects and undertakings that indicated progress towards the short-term objectives. However, the short-term objectives were not sufficiently specific or detailed to enable assessment of efforts at attaining those objectives. For example, one such objective was "to continue to provide a training program for recipient staff to achieve greater understanding of EO requirements, greater standardization of compliance activities, and improved coordination between recipient and DCR staff."[152] In order to have meaningfully evaluated progress toward meeting this objective, the plans should have specified the type of training intended, the amount of training required, and the frequency that such training should occur.

Beyond a general statement of its expected staff and budget for the year, the 1990 plan contained no information regarding DCR's intentions to use its resources to accomplish its goals and objectives. DCR's implementation plans did not indicate a 4-year planning cycle based on anticipated workload and resources.

DCR staff generally characterized the Civil Rights Implementation Plans as useless.[153] They indicated that, for example, without a common definition of "compliance review," comparisons among agencies are meaningless: some agencies' "compliance reviews" are merely checklists, whereas others are extremely thorough. DCR staff also explained that a principal reason why DOL does not use implementation plans as planning documents is that they are not given adequate support and review by the Department of Justice.[154]

## Findings and Recommendations

### Organization, Budget, Staffing, and Workload of DOL's Civil Rights Enforcement Function

#### Organization

**Finding:** The office with responsibility for the U.S. Department of Labor's (DOL) enforcement of Title VI, the Directorate of Civil Rights (DCR), is located in the Office of the Assistant Secretary for Administration and Management. The Director of

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[149] DOL FY 1990 Implementation Plan, p. 22.

[150] Ibid, pp. 22–24; DOL FY 1991 Implementation Plan, p. 22; DOL FY 1992 Implementation Plan, p. 21; DOL FY 1993 Implementation Plan, section III.A (no page number); DOL FY 1994 Implementation Plan, p. 26.

[151] U.S. Department of Justice, "Guideline for Agency Implementation Plans Required by Executive Order 12250, 'Leadership and Coordination of Nondiscrimination Laws'" (no date).

[152] DOL FY 1990 Implementation Plan, p. 25.

[153] DCR staff interview, p. 7. The Commission found an apparent inconsistency in the 1993 implementation plan. In its progress report, the 1993 implementation plan says that DCR reduced its case backlog from 151 to 60 during 1992. DOL FY 1993 Implementation Plan, III.C.1. These numbers are inconsistent with the numbers reported in the workload and performance data section of the plan, which indicates that the backlog at the beginning of 1993 was 311, and the backlog at the end of the year was 122. Ibid.

[154] DCR staff interview, p. 7.

DCR reports to the Assistant Secretary for Administration and Management, who in turn reports to the Deputy Secretary of Labor. As such, the Director of DCR may lack sufficient status within the organizational structure of DOL to ensure that civil rights enforcement remains a DOL priority.[155]

**Recommendation:** The organizational status of DCR's Director inherently affects her ability to obtain funding for civil rights enforcement, influence DOL policy development on civil rights enforcement, and promote DCR's mission relative to other DOL obligations. DOL should establish DCR as an independent office headed by an Assistant Secretary who reports directly to the Secretary, analogous to the Department of Education. That will improve DCR's potential to achieve a comprehensive and successful Title VI enforcement program.

**Finding:** Generally, the organizational structure of DOL's external civil rights enforcement program is adequate for Title VI enforcement in its federally assisted programs. Aside from legal staff located in the Division of Civil Rights in the Office of the Solicitor, DCR's Director has direct (line) authority over all DOL staff engaged in civil rights enforcement.[156] This organization enables the Director of DCR to manage directly and thereby ensure uniformity in the execution of DOL's Title VI enforcement procedures.

**Recommendation:** DCR should acquire independent legal staff to provide the legal guidance and interpretation necessary for achieving comprehensive Title VI enforcement. The Commission recognizes the importance of interaction between DCR and DOL's legal counsels. However, the Commission believes that the presence of legal support staff within DCR would promote an efficient Title VI enforcement program. In providing technical assistance, DCR attorneys will be available to address legal issues related to external civil rights enforcement immediately. Furthermore, DCR will not have to depend solely on legal staff outside of its office to perform necessary additions to Title VI regulations or legal analysis related to Title VI.

**Finding:** DCR is divided into two separate units, one responsible for internal civil rights enforcement (the Office of Equal Employment Opportunity and Affirmative Action) and one responsible for external civil rights enforcement (the Office of Program Compliance and Enforcement (OPCE)). This structure helps to ensure that external civil rights enforcement is not compromised by internal equal opportunity activities. Furthermore, OPCE is divided into two divisions, one that conducts postaward compliance and technical assistance activities (the Division of Technical Assistance and Compliance Monitoring), and one that processes discrimination complaints filed against recipients (the Division of Equal Opportunity Investigations and Enforcement).[157] This structure enables DOJ to ensure that these particular activities receive focus and that OPCE staff develop expertise in these areas. However, no divisional units exist for other activities important to an effective Title VI enforcement program.

**Recommendation:** DCR needs to create within OPCE additional divisions devoted to performing enforcement activities in addition to complaint investigations and postaward compliance and technical assistance. Specifically, OPCE needs to acquire staff specifically assigned to perform: 1) preaward reviews; 2) community outreach and public education; and 3) Title VI staff training, each of which is a critical compliance and enforcement activity.

**Finding:** Neither OPCE nor DCR has a policy development unit.[158]

**Recommendation:** Although DCR's practical design facilitates Title VI enforcement, it could be improved. Specifically, DCR should establish within OPCE a policy and planning unit to provide overall enforcement policy guidance to DCR staff and State recipient staff with Title VI enforcement responsibilities. In improving the organizational structure of its external civil rights enforcement unit, DOL generally should use the Department of Education's Office for Civil Rights as a model. Specifically modeling its organizational structure after DOEd's external civil rights enforcement program would better facilitate DCR's ability to implement a comprehensive Title VI enforcement program.

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[155] *See* p. 355.

[156] *See* pp. 354–55.

[157] *See* pp. 354–55.

[158] *See* pp. 354–56.

**Finding:** DCR's regional staff work on Title VII issues only. They do not perform activities related to Title VI enforcement.[159]

**Recommendation:** The Commission acknowledges that DOL centralized its external civil rights enforcement function with the intent of promoting a more uniform and consistent external equal opportunity monitoring program.[160] Because DCR does not have regional staff performing Title VI enforcement, it must ensure that it has budgetary resources to finance travel costs for onsite reviews of recipients and onsite performance evaluations of States that perform civil rights enforcement activities. If the frequency of onsite reviews and evaluations produces travel costs that outweigh the expense of regional external civil rights enforcement staffing, DOL should consider placing at least some external civil rights enforcement staff in regional offices.

### Budget, Staffing, and Workload

**Finding:** DOL's appropriation does not contain an earmarked budget for DCR. However, DOL's Office of Administration and Management, which receives an earmarked amount, provides specific funding for DCR.[161] That allocation for DCR differentiates generally between internal and external civil rights enforcement.

**Recommendation:** Although DCR does receive separate budget allocations for internal and external civil rights enforcement, the allotment for external civil rights enforcement should be developed by the Director and directed at specific enforcement mechanisms performed by OPCE's different divisions. This will enable DCR's Director to ascertain increases or decreases in resources designated and available for external civil rights responsibilities and to base essential enforcement decisions, such as staffing assignments and future enforcement funding requests, upon such information. In addition, it will enable DCR to share staff and resources designated for external civil rights enforcement with other internal civil rights functions, without commingling such staff and resources at the expense of external equal opportunity responsibilities.

**Finding:** OPCE's staff size is insufficient to ensure adequate enforcement of Title VI in all federally assisted and conducted programs. Between 1981 and 1988, DCR's allocation of staff and resources to OPCE for civil rights enforcement for federally assisted and federally conducted programs decreased. DCR's overall budget has continuously risen since 1988, but OPCE's budget has remained constant. Even though OPCE's decrease in resources stabilized, its civil rights enforcement workload increased.[162] DCR attributes its decrease in staff and resources during the 1980s to a reorganization. It is not clear that DCR's 1986 reorganization was also responsible for OPCE's budget remaining constant while DCR's overall civil rights budget increased. DCR's 1986 centralization of its external civil rights enforcement staff into one national office may have resulted in a more uniform and consistent external equal opportunity monitoring program; however, because of the decrease in resources and staff, DCR has been unable to fulfill its obligation to all of its funding programs. As a result of the staff streamlining and downsizing associated with DCR's reorganization, it could only concentrate on ensuring equal opportunity in its JTPA programs.

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[159] Ibid.

[160] Ibid.

[161] *See* p. 355.

[162] *See* pp. 355–58.

**Recommendation:** The staffing and resources level resulting from DCR's reorganization should be reevaluated to determine the extent to which additional staff and resources are needed to implement a comprehensive Title VI enforcement program. DOL must provide DCR with sufficient staff and resources to ensure that DCR's implementation, enforcement, compliance, oversight, and monitoring activities for Title VI enforcement reaches all federally assisted DOL programs, not just JTPA programs.

DCR must have the resources to build an effective Title VI enforcement program. For continuing State programs, such as the JTPA programs, DCR requires sufficient resources to develop strong oversight and monitoring mechanisms, especially since virtually all DOL programs receive JTPA funds and because DCR remains ultimately responsible for DOL's implementation and enforcement of Title VI. DCR should receive necessary staff to develop comprehensive procedures for the enforcement authority delegated to State program offices. These procedures should instruct State staff to perform the mechanisms assigned them, such as onsite investigations and reviews of subrecipients' facilities. DCR should have sufficient resources to establish a thorough oversight and monitoring system to review, evaluate, and direct State offices' performance relating to Title VI compliance of States' subrecipients. In particular, DCR should have funds to support regular reviews of State staff efforts, assistance and training for State staff, and a system of disseminating agency policy guidance and general legal and regulatory guidance to State and local recipients. State offices should be required to report specific activities on a quarterly basis, and DCR should have staff to collect and analyze these reports, in addition to other oversight and monitoring functions.

Only after DCR has developed an effective oversight and monitoring program for State and local Title VI compliance activities should DCR consider assigning to States responsibilities in programs not already subject to State and local Title VI compliance efforts. Since the majority of DOL's programs are State administered, delegation of implementation and enforcement responsibilities to State recipients' staff may be an efficient means to ensure that Title VI enforcement reaches all DOL-funded programs. However, States must be held formally accountable to the Federal Government for this responsibility, and DCR should delegate responsibilities only with the realization that it bears ultimate responsibility.

DCR's civil rights enforcement efforts with respect to JTPA programs and JTPA regulations should serve as the model. State staff should be delegated procedures that are more easily performed at field locations, such as onsite compliance reviews, onsite compliant investigations, and local outreach, education, and assistance to subrecipients. DCR's national office staff (OPCE) can conduct compliance reviews and investigations that do not have to be done locally, such as preaward and postaward desk-audit reviews. It can also manage recipient data collection and analysis and review recipients' self-assessments and assurances of nondiscrimination. In addition, the national office staff should be responsible for providing guidance to and proactively monitoring and overseeing the daily implementation and enforcement activities of the State recipients' staff. State staff would perform the same role relative to subrecipients' compliance performance. However, it is crucial that DCR first build an effective Title VI implementation, compliance, and enforcement program that will ensure that States meet their responsibilities before it relies on States to conduct Title VI compliance and enforcement efforts.

## Regulations, Guidelines, Policies, and Procedures

### Regulations

**Finding:** DOL's Title VI regulations do not contain an appendix listing DOL's federally assisted programs or identifying State continuing programs. Because DOL has not updated the regulations since 1980, they do not reflect recent Title VI developments, particularly the Civil Rights Restoration Act of 1987 and its clarifications on Title

VI's coverage.[163] Although DOL has at least two guidebooks that address the Civil Rights Restoration Act with respect to Title VI's coverage, these documents do not address the act's implications with regard to fund termination and the "infection" theory.

**Recommendation:** DOL should add an appendix to its general Title VI regulations specifying the types of financial assistance programs DOL administers. It should list separately State continuing programs to identify those programs in which State or local agencies have responsibilities for Title VI compliance and enforcement. Furthermore, DOL should issue Title VI guidelines or policy guidance communicating clearly the implications of the Civil Rights Restoration Act of 1987, particularly if DOL recognizes, in practice, the termination of funding when discrimination is "pinpointed" to a federally funded program or activity *or* when a showing is made that discrimination "infected" the program elsewhere in the operations of the recipient. The guidelines also should provide practical illustrations based on DOL federally assisted programs, both JTPA and non-JTPA programs.

**Finding:** DCR contends that its JTPA regulations apply to "virtually" all of its federally funded programs because "virtually" all of its funding recipients ultimately receive some financial assistance associated with the JTPA program.[164] DOL's JTPA regulations, adopted in 1993, are considerably more extensive than its Title VI regulations. They contain a more comprehensive provision prohibiting employment discrimination in the administration of JTPA-funded programs and activities. They include a requirement that recipients "make efforts to provide equitable services among substantial segments of the population eligible for participation in JTPA." The JTPA regulations are also more specific regarding dissemination of recipients' nondiscrimination policies, data collection requirements, and obligations of State officials.[165]

**Recommendation:** If, in fact, DOL's JTPA regulations cover virtually all of its federally funded programs, these regulations must officially be made applicable to all DOL programs through revised regulations. One set of current and thorough regulations applicable to each type of funding program DOL administers would better facilitate DCR's ability to implement and enforce Title VI uniformly and comprehensively. Otherwise, its general Title VI regulations must be updated and improved to incorporate the more comprehensive JTPA provisions. For example, the general regulations should, like the JTPA regulations, address the following: 1) provide for an overall prohibition against employment discrimination in the administration of any DOL financial assistance program or activity; 2) instruct that employment-related investigations and reviews in funding programs be conducted according to the Equal Employment Opportunity Commission regulations and case law; 3) require that recipients "make efforts to provide equitable services among substantial segments of the population eligible for participation" in each type of DOL program; 4) require recipient efforts to broaden the composition of the pool of applicants for DOL-funded programs or activities (in addition to conducting traditional outreach); and 5) set forth specific provisions regarding dissemination of recipients' nondiscrimination policies, data collection requirements, and obligations of State officials in State-administered DOL assistance programs.

### Guidelines

**Finding:** DOL's Title VI guidelines, especially those pertaining to the JTPA, are better than those of many other Federal agencies in providing guidance on Title VI enforcement. However, DOL has not promulgated guidelines for *each* of its federally assisted program, as required by the Department of Justice. DOL has issued detailed guidance manuals or guidebooks for at least three of its federally assisted programs.[166]

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[163] *See* pp. 359–60.

[164] *See* note 47.

[165] *See* pp. 366–69.

**Recommendation:** DOL must promulgate a set of guidelines for the implementation and enforcement of Title VI in *each type* of federally assisted program it administers. The Department of Justice requires that each set of guidelines: 1) explain the exact nature of DOL' Title VI requirements; 2) specify methods of enforcement; 3) provide examples of prohibited practices in the context of each particular type of funding program; 4) set forth required or recommended remedial action; and 5) describe "the nature of requirements relating to covered employment, data collection, complaints, and public information." For such guidelines to be effective, they should establish methods of administration or requirements for States assuming Title VI compliance responsibility for their recipients and ensure that recipients conduct self-assessments of their compliance status and take corrective action to correct any deficiencies noted in such self-assessments. In addition, such guidelines should include definitive implementation, compliance, and enforcement standards and procedures for the agencies and the States assuming Title VI responsibility, including detailed complaint procedures, investigative methods, timetables for filing complaints, methods of enforcement, and remedial action procedures. The guidelines must also set forth and explain the process for data collection from recipients and analysis of such data and should address requirements for public education and community outreach. Regarding data collection, the Department of Justice requires agencies' guidelines to include instructions and specific examples concerning the type of data and information that must be maintained by recipients and applicants.

### Policies

**Finding:** DOL has failed to establish an active policy program nor has it updated its policies. It produced no policy statements on issues, such as fund termination following enactment of the Civil Rights Restoration Act of 1987, concerning Title VI implementation and enforcement.

**Recommendation:** DCR (OPCE) must commence regularly developing policies specific to Title VI implementation and enforcement and communicating such policies to staff assigned Title VI responsibilities. Such policies generally should be aimed at providing civil rights enforcement staff and funding recipients with a complete understanding of the meaning and intent of Title VI compliance relative to the specific types of programs DOL administers. In particular, DCR should publish policies regarding DOL's standards for recipient (and subrecipient) compliance with Title VI, including example discriminatory practices prohibited by Title I in DOL's programs. In light of the Civil Rights Restoration Act's implications on the fund termination remedy, DCR should issue a policy statement clarifying DOL's position on that issue. All policy directives must be distributed to DCR staff, State recipients' staff, and subrecipient staff responsible for ensuring Title VI compliance.

### Procedures

**Finding:** DOL does not have current Title VI compliance or complaint manuals. However, DCR has issued several documents with standard operating procedures for Title VI implementation and enforcement, such as for processing Title VI complaints and conducting compliance reviews. DCR also uses training materials developed for the States as a Title VI complaints manual. DCR is in the process of developing a revised compliance manual and a complaints manual.[167]

**Recommendation:** DOL must promulgate uniform Title VI enforcement procedures for its civil rights enforcement staff and funding recipients, including step-by-step instructions for implementing Title VI, from the application and preaward process through compliance review and complaint processing, *in each type* of program DOL sponsors. This is especially important for its State-administered programs. Since those programs are actually managed by State and local recipients, rather than by DOL, they involve special and more complicated enforcement issues related to DOL's oversight and monitoring of States' Title VI implementation efforts. Hence, it is critical that both DCR staff and State and local recipients understand how to conduct the enforcement mechanisms particular to such programs.

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[166] *See* p. 360.

[167] *See* pp. 360–61.

## Process of Title VI Enforcement

### Preaward Reviews

**Finding:** DCR does not conduct preaward reviews. Instead, DOL's grants-making offices are responsible for ensuring that all DOL grants include assurances of nondiscrimination. States are responsible for performing any preaward reviews and obtaining necessary assurances for continuing State-administered programs. The failure of OPCE, DOL's external civil rights enforcement unit, to conduct preaward reviews significantly limits DOL's ability to ensure that its federally funded programs are being operated in a nondiscriminatory manner.[168]

**Recommendation:** The Department of Justice has specified clearly that preaward desk audits do not include routine reviews of assurance forms or other documents to ensure that they have been completed properly. Therefore, DCR's preaward review efforts must encompass more than a requirement that grants-making offices check for submissions of assurance forms. DCR must ensure that a State will maintain an active Title VI enforcement program before it receives funding. Furthermore, DCR must implement preaward reviews for all programs receiving Federal funds. Since DOL's Title VI regulations require each State to develop a methods of administration, for the State continuing programs, DCR should assess, *prior to granting funds*, States' methods of administration as well as their annual reports or self-assessments on Title VI enforcement, for the previous year or period subsequent to the last compliance review. If review of these documents would create too long of a delay in the grant award process, at a minimum DCR should modify DOL's Title VI regulations to include provisions, like those for JTPA, which require all applicants and recipients to report: 1) any administrative enforcement action or other legal action that alleges discrimination; 2) any findings of noncompliance by other Federal agencies that conduct compliance reviews; and 3) records of discrimination complaints received as well as status or findings. These data should cover the period subsequent to the last compliance review or the preceding 5 years for a first-time applicant. Reporting of these data to DCR should be a precondition to receiving funds, with a sanction of prohibition, suspension, or termination of funds for failure to report or false reporting. DCR should conduct preaward onsite reviews if this basic preaward desk-audit reveals a likelihood of noncompliance.

DCR should review this information at the preaward stage although it should consider other data, if necessary. Specifically, such reviews should be aimed at identifying discriminatory practices in the delivery of program services based upon evidence, such as unequal participation rates. They should necessarily involve an examination of documents related to a recipient's administration of a particular Federal program, including, but not limited to: 1) implementation and enforcement policies and information on specific compliance activities; 2) statistical evidence on program and activity participation rates by racial and ethnic minorities; 3) applications or interview material related to program or participation acceptance or selection; 4) data and information related to the demographic makeup of the program's affected community or pool of potential participants; 5) statistical evidence related to rejection rates; and 6) community outreach and public education materials.

The Commission concurs with the Department of Justice that preaward reviews, both desk audit and on site, are essential to an effective Title VI enforcement program and, therefore, DCR should conduct them on all DOL program applicants and recipients. However, the Commission recognizes the budget and staffing limitations of DCR. It realizes that, with continuing emphasis on downsizing and restructuring the Federal Government and maintaining fiscal responsibility, DCR may be unable to acquire additional staff to strengthen fully all aspects of DOL's Title VI implementation, compliance, and enforcement program. The Commission also understands that a lengthy preaward process will delay program benefits and, in effect, adversely impact on ultimate beneficiaries. In light of these factors, the Commission recommends some alternative strategies that will promote a meaningful and efficient preaward process on as many applicants and recipients as possible, eliminating reliance on cursory preaward reviews. These strategies should serve only as a secondary alternative to the optimal preaward compliance review process described above. Although this alternative may not be the most effective at ensuring full enforcement of Title VI, it should allow agencies to have some type of meaningful preaward review mechanism without critically impacting on Title VI enforcement. (See p. 362 in this chapter.)

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[168] *See* p. 362.

### Postaward Desk-audit Reviews

**Finding:** Recently, DCR has not conducted postaward desk-audit reviews as an enforcement mechanism independent of onsite reviews. Rather, it performs desk audits only as part of its onsite compliance review process. Its failure to use postaward desk-audit reviews as a Title VI enforcement tool reflects an inefficient utilization of Title VI resources, since postaward reviews enable funding agencies to review large numbers of recipients with comparatively fewer resources.[169]

**Recommendation:** The Department of Justice requires that agencies establish a postaward compliance review process. In order to meet that requirement, DCR (OPCE) should, given present staffing levels, utilize postaward desk-audit reviews to ensure continuing compliance with Title VI *among all recipients*. Because DOL has an elaborate data collection and analysis system, it should rely on this asset to reach a large number of recipients in desk-audit reviews. DCR already has postaward desk-audit procedures in place to identify deficiencies in recipients' delivery of program services to potential and actual participants and beneficiaries of all races and ethnicities and potential discriminatory barriers to participation or disparate treatment in participation.[170] However, it should expand the review to evaluate recipients' public education of program accessibility and outreach to potential beneficiaries and the affected community and to identify recipients needing technical assistance or further onsite investigation. The desk audits should also be designed to fit each particular type of DOL funding programs. The results of a post-award review must be in writing and include specific findings and recommendations for achieving compliance. As with preaward reviews, postaward desk-audit reviews would necessarily be limited to documentary evidence concerning recipients' administration of federal programs. The same types of documents and material could be examined.

### Onsite Compliance Reviews

**Finding:** DCR has performed a decreasing number of Title VI compliance reviews. To the extent that DCR (OPCE) does such reviews of State and local agencies, they focus on the JTPA program and, consequently, do not adequately cover other DOL-funded programs.[171]

**Recommendation:** DCR (OPCE) must conduct onsite compliance reviews of *all* grant recipients' facilities or, at least, those identified to be in noncompliance by desk-audit reviews. First, the recipient's facility should be thoroughly investigated to identify potentially discriminatory staffing patterns or other potentially discriminatory employment or service practices. Second, staff should interview funding recipient officials, communities affected by the recipient's programs or activities, program participants or beneficiaries, and counselors or interviewers responsible for assisting participants and program beneficiaries' involvement. Third, compliance policies and practices should be carefully ascertained and examined. Fourth, statistical evidence on participation rates should be examined, as well as statistical evidence on application rejection rates. Fifth, applications, or other interview materials, for assistance should be examined to detect possible barriers to participation, such as discriminatory criteria (either intentional or in effect). Sixth, efforts to educate the public and affected community of programs and activities should be evaluated, especially efforts to provide program accessibility information to limited-English-speaking communities or otherwise disadvantaged communities. Each review must be designed to fit the particular type of program at issue. To effectuate a comprehensive compliance review system, civil rights staff must be trained to conduct onsite compliance investigations. If necessary, several of these procedures involving the examination of documentary material could be accomplished by a thorough desk-audit investigation.

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[169] *See* p. 363.

[170] *See* pp. 15–16.

[171] *See* p. 363.

**Finding:** Although DCR's onsite compliance reviews previously assessed compliance both at the State and the local level, DCR more recently decided to assess State compliance through evaluating methods of administration submitted by the State recipients, leaving onsite reviews for local recipients.[172]

**Recommendation:** If DCR (OPCE) is inadequately staffed to perform onsite investigations, then that function should be delegated to States to review subrecipients. However, if DCR assigns to States the responsibility of conducing onsite reviews of ultimate funding recipients, it must strengthen its requirements regarding States' methods of administration. In addition, DCR will need to increase its technical assistance to and monitoring of State recipients. Finally, DCR will need to develop an alternative method for communicating with its funding program participants and beneficiaries, such as through community outreach and education.

### Complaint Investigations

**Finding:** DCR received an increasing number of civil rights complaints during the past decade. However, the number of Title VI complaints received has declined dramatically, approximating only 5 percent of all complaints received.[173]

**Recommendation:** DCR needs to increase its public education about Title VI's nondiscrimination requirement and the rights thereby afforded federal funding program participants and beneficiaries. Otherwise, potential and actual participants and beneficiaries will not be adequately informed of their rights to pursue and protect those rights by filing complaints against DOL funding recipients with DCR.

### Deficiencies, Remedies, and Sanctions

**Finding:** DCR generally encourages recipients to comply voluntarily with Title VI when they are discovered to be in noncompliance.[174]

**Recommendation:** DCR must establish a system of monitoring commitments to corrective action. Although such case settlements generally are more efficient than full-fledged legal proceedings, they require monitoring to ensure that remedial action is actually implemented pursuant to the agreement. Such monitoring should be conducted regularly and uniformly of all cases and should involve efforts to ensure compliance until compliance is fully achieved.

### Outreach and Education

**Finding:** DCR generally has no direct interaction with community and advocacy groups. Instead, DCR generally delegates outreach and education activities to its recipients. For example, in JTPA programs, the regulations require recipients to disseminate JTPA's nondiscrimination policy to actual and potential participants and beneficiaries. They extensively detail how such dissemination should occur, including, for example, requirements for dissemination to persons with limited English proficiency.[175]

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[172] *See* p. 364.

[173] *See* p. 364.

[174] *See* pp. 364–65.

[175] *See* p. 365.

**Recommendation:** Regarding community outreach, DCR needs regularly to solicit comments and suggestions from affected communities and funding recipients on its Title VI enforcement efforts. It also should solicit information about affected communities' civil rights concerns about protection of Title VI rights, and funding recipients' compliance concerns about potential Title VI violations and agency compliance expectations. Regarding public education, DCR needs to inform, actively and regularly, potential and actual participants, beneficiaries, and affected communities concerning the extent of their rights and how to pursue and protect their rights, including procedures for filing complaints. DCR also should ensure that recipients educate the public regarding program accessibility.

### Technical Assistance

**Finding:** DCR generally provides technical assistance upon request. It also regularly conducts training seminars for State and local agency staff concerning enforcement topics such as data collection and analysis, onsite compliance reviews, complaint processing, and resolution of noncompliance. DCR conducts an annual national conference and offers 1-day presentations regarding specific aspects of external civil rights compliance. Recently, DCR's technical assistance has focused on the nondiscrimination and equal opportunity provisions of the JTPA.[176]

**Recommendation:** DCR should regularly train its staff and recipients' staff on the methods for achieving enforcement (step-by-step instruction on conducting procedures, such as compliance reviews) and new and developing civil rights issues, especially changing case law, statutes, regulations, and policies, affecting Title VI enforcement in DOL grant programs.

## Oversight of Continuing State Programs

**Finding:** DOL distributes most of its Federal financial assistance through continuing State programs. As a means of monitoring compliance in such programs, DOL's Title VI regulations require each State to provide a statement that it is in compliance with Title VI and to develop methods of administration demonstrating States' process for ensuring subrecipients' compliance with Title VI. By reviewing States' statements of compliance and their methods of administration, DCR monitors State recipients' compliance enforcement and provides technical assistance as necessary. DCR never used methods of administration as a means of monitoring States' enforcement efforts until 1993.[177] To date, DCR's Title VI enforcement activities and oversight of State-administered programs focus primarily upon its JTPA programs.[178]

**Recommendation:** DCR must establish a systematic oversight and monitoring program to evaluate the Title VI compliance policies and activities connected with all programs and activities administered at the State and local levels, not just JTPA programs. First, States must submit methods of administration demonstrating how they intend to ensure recipient compliance with Title VI. That document must include, but should not be limited to, the following: 1) a specific public outreach and education plan for notifying subrecipients of Title VI compliance requirements; 2) a training program for State and local program staff, subrecipients, and beneficiaries regarding DOL' nondiscrimination policies and procedures; 3) procedures for processing complaints, notifying the funding agency, and informing beneficiaries of their rights; 4) a program assessing and reporting periodically on the status of Title VI compliance that involves more than merely a checklist of activities and assurances; and 5) detailed plans for bringing discriminatory programs into compliance. Such assurances are particularly important when the State is responsible for conducting compliance mechanisms, such as preaward reviews, investigating complaints, reviewing and evaluating self-assessments, and conducting compliance reviews. Second, DCR should regularly review the Title VI compliance policies and activities of States to evaluate how States are applying their methods of administration. Such reviews should entail a comprehensive evaluation of the States Title VI enforcement performance. Third, DCR also should systematically monitor and oversee States' data collection and analysis program. Just as Federal funding agencies are required by the Department of Justice to collect and maintain data on their direct recipients, State and local primary recipients must collect and maintain data on their potential and actual subrecipients, beneficiaries, and affected communities. It is the Federal agency's role to monitor this data collection process and ensure that States are maintaining sufficient records. Finally, DCR should also regularly provide technical assistance and other guidance to States to facilitate their Title VI enforcement efforts. Such assistance could involve instruction concerning methods for achieving enforcement (step-by-step instruction on procedures, such as compliance reviews), and new and developing civil rights issues affecting Title VI enforcement, such as changes in statutes, case decisions, regulations, and DOL compliance policies.

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[176] *See* p. 366.

[177] *See* p. 366.

[178] *See* p. 367.

**Finding:** DOL places comprehensive requirements on States to ensure nondiscrimination through its JTPA regulations. For example, the JTPA regulations assign to the State's Governor responsibility for ensuring compliance with the nondiscrimination and equal opportunity provisions of JTPA. Currently, States are not subject to this requirement under Title VI regulations. Therefore, States' Governors have civil rights compliance and enforcement responsibilities for JTPA programs, but not for DOL's other federally assisted programs that do not receive JTPA funds. However, promulgation of the JTPA regulations has led to improvements in DOL's oversight and monitoring of continuing State programs for Title VI. For example, the JTPA regulations instruct States to designate an equal opportunity officer, who should report directly to the State JTPA director. The equal opportunity officer must receive sufficient staff and resources to effect compliance and should be required to undergo training at the State's expense. Although DOL's Title VI regulations do not provide authority for this requirement, DCR uses the JTPA regulations to impose this requirement on each DOL-funded program. In addition, the JTPA regulations provide detailed instructions about the States' methods of administration for the JTPA, and DOL has issued detailed guidelines to assist States in meeting the regulations' standards for methods of administration.[179] Although States must submit methods of administration under Title VI regulations, it was not until 1993, when the JTPA regulations were promulgated and requirements on methods of administration became more stringent, that DOL began an active and systematic program of evaluating methods of administration.

**Recommendation:** DOL must ensure that there is nondiscrimination in all of DOL's federally assisted programs. DOL has strong requirements imposed on States for the JTPA program to facilitate oversight and monitoring of continuing State programs. DOL must ensure that these requirements extend to all DOL-funded programs. DCR contends that virtually all of its funding recipients ultimately receive some funding associated with the JTPA program and that its JTPA regulations apply to virtually all of its federally funded programs. In practice, it has extended the requirement that States designate an equal opportunity officer to apply to each DOL-funded program. DOL must modify the regulations to make the JTPA requirements applicable to all DOL programs. Otherwise, its general Title VI regulations must be updated and improved to incorporate the more extensive JTPA provisions regarding State-administered programs. For example, like the JTPA regulations, DOL's Title VI regulations should: 1) delegate to the State's Governor the responsibility for oversight of all State-administered programs, including responsibility for negotiating with subrecipients to secure voluntary compliance when noncompliance is found; 2) require States to designate an equal opportunity officer, who must report directly to the State program director and who must receive sufficient staff and resources to effect compliance and should be required to undergo training at the State's expense; 3) include detailed instructions about the States' methods of administration, including that the methods of administration must be written and updated regularly and must include the several specific elements and a narrative and documentation accompanying each element.

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[179] *See* pp. 367–68.

## Staff Training

**Finding:** DCR conducts ongoing training for its external civil rights enforcement staff, including computer training, instruction on writing and management skills, seminars concerning particular DOL funding programs, briefings on each of DOL's federally funded programs, instruction on methods for conducting enforcement mechanisms (such as compliance reviews), and training on statutes enforced by DCR. All new DCR employees receive training in civil rights compliance. However, DCR has never conducted training specifically on Title VI.[180]

**Recommendation:** DCR needs to hold regular training for its staff and recipients' staff on issues specific to Title VI enforcement and compliance, including, but not limited to, the following areas: instruction on conducting enforcement procedures, such as compliance reviews, compliant investigations, and public education; the nexus between Title VI and a particular funding program's objectives and administration; the nexus between Title VI and other civil rights enforcement provisions relevant to ensuring nondiscrimination in federally funded activities; Title VI nondiscrimination requirements in particular types of DOL programs; and updates on revisions in DOL's policy, case law, statutes, regulations affecting Title VI enforcement and compliance.

## Data Collection and Analysis

**Finding:** DOL's JTPA recipient data collection and analysis system is an excellent model of a recipient compliance evaluation system that facilitates Title VI enforcement. For example, the JTPA regulations comprehensively detail the type and nature of data required of recipients. In addition, DOL's program includes a mandatory reporting system, entitled the Standardized Program Information Record (SPIR), for recipients of JTPA funds. Under the system, States must ensure that subrecipients collect extensive data on each JTPA participant, but not necessarily on all applicants. The SPIR database enables DCR to conduct analyses at the State (recipient) and local (subrecipient) levels to determine where significant statistical disparities exist. It also enables DCR to monitor State recipients' selection of subrecipients for desk-audit and onsite compliance reviews. DCR staff also can use the database to conduct indepth analyses of individual records during compliance reviews.[181]

**Recommendation:** In addition to collecting information on participants in JTPA funding, DCR should require State recipients to maintain on their information ("SPIR") databases information on applicants for JTPA funding. DCR also should be able to access all of the collected data online or through other means, rather than only being able to gather it during the course of compliance reviews.

**Finding:** For non-JTPA programs, DCR requires recipients to report data only during compliance reviews. Although DOL's Title VI regulations require that each recipient maintain data so that DCR may determine whether the recipient is in compliance with Title VI, the regulations provide few details on the nature of data recipients should keep. Recipients are generally instructed to maintain the data in such form as DOL deems necessary and to maintain data demonstrating the extent to which members of minority groups are beneficiaries of federally assisted programs.[182]

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[180] *See* p. 368–69.

[181] *See* pp. 369–71.

[182] *See* pp. 371–72.

**Recommendation:** DCR must institute a comprehensive and systematic data and information collection and analysis program in order to ensure that *all* DOL funding recipients and subrecipients (not just those receiving funding pursuant to the JTPA) remain in compliance with Title VI. Generally, information should be collected that assists DCR in ascertaining deficiencies in ultimate funding recipients' administration of DOL' programs. Such information should include, but should not be limited to: the racial and ethnic makeup of potential and actual participants and beneficiaries, the racial and ethnic makeup of the affected community or pool of potential participants and beneficiaries, and the racial and ethnic makeup of the staff administering the program. As with the JTPA program, DCR should provide detailed instructions on the type of data to be collected from recipients (and subrecipients). Such information should be collected regularly and independently of other enforcement measures and not only in conjunction with compliance reviews. In particular, DCR should establish the same program information database ("SPIR") for *all* of its State-administered programs, not only those related to the JTPA. Specifically, States should be required to maintain uniform databases containing data on both actual and potential participants (applicants) of DOL programs. To effectuate this overall data collection and maintenance system, DCR should provide its external civil rights staff and the external civil rights staff of its State recipients with training on all aspects of its function.

## Civil Rights Implementation Plans

**Finding:** DCR's Civil Rights Implementation Plan for 1990 was a base-year plan covering the period 1990–1993, and the 1991–1993 plans were updates of the 1990 plan. Generally, the plans provided a detailed description of DOL's Title VI enforcement program. However, the plans did not function, as the Department of Justice requires, as a planning tool for DOL. The 1990 plan specified two long-range goals and also listed four major objectives and five short-term objectives designed to meet the long-range goals. Civil rights implementation plans for subsequent years restated the long-range goals, major objectives, and short-term objectives, and reported on specific projects and indicating progress made towards the short-term objectives. However, the short-term objectives were not sufficiently specific or detailed to enable assessment of efforts at attaining those objectives. In addition, beyond a general statement of its expected staff and budget for the year, the 1990 plan contained no information regarding DCR's intentions to use its resources to accomplish its goals and objectives. DCR's implementation plans also did not indicate a 4-year planning cycle based on anticipated workload and resources.[183]

**Recommendation:** DCR (OPCE) must develop planning and priorities initiatives that incorporate the qualities of its implementation plan, strategic plan, and work plan. The ideal planning document should embody: specific short-term goals and long-term objectives, specific timeframes or deadlines for their accomplishment, specific short-term and long-term strategies for their accomplishment, consideration of both available and projected resources and budget constraints, application of these priorities and plans to each type of funding program administered, application of these priorities and plans to the particular enforcement mechanism for block grant and continuing State programs, and consideration of the number of expected complaints or other increase in workload. This document should be updated every 3 months and should be adjustable to increases and decreases in actual compliance activities and responsibilities and new or developing civil rights enforcement issues, such as agency initiatives and concerns of recipients, beneficiaries, participants, and affected community groups.

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[183] *See* p. 372.

## Chapter 10

# U.S. Department of the Interior

The U.S. Department of the Interior (DOI) provides approximately $900 million annually in Federal financial assistance.[1] Overall, since the enactment of the Civil Rights Act of 1964, DOI has distributed $22.2 billion in financial assistance to 12,414 recipients through 62 programs.[2] In fiscal year 1994, DOI's total civil rights budget was $5.2 million.[3] Generally, DOI devotes approximately 15 staff years annually to enforcement of Title VI and other civil rights statutes pertaining to federally assisted programs;[4] however, DOI's external civil rights enforcement staff[5] consists of only six full-time equivalent positions (FTEs).[6]

## DOI's Federally Assisted Programs

DOI's federally assisted programs are operated by the Department's various bureaus: the National Park Service and the U.S. Fish and Wildlife Service, under the Assistant Secretary for Fish and Wildlife and Parks; the Bureau of Indian Affairs under the Assistant Secretary for Indian Affairs; the Bureau of Land Management, the Office of Surface Mining Reclamation and Enforcement, and the Minerals Management Service under the Assistant Secretary of Land and Minerals Management; and the U.S. Geological Survey, the Bureau of Reclamation and the U.S. Bureau of Mines under the Assistant Secretary for Water and Science.[7]

The National Park Service administers three major federally assisted programs:

- The *land and water conservation fund*, the largest of the programs operated by the National Park Service, has since its inception provided $3.2 billion to States for park acquisition and outdoor public recreation projects.[8] Overall, the land and water conservation fund has funded over 36,000 different park and recreation projects.[9] In fiscal year 1994, the land and water conservation fund provided grants totaling $60 million.[10]

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[1] Office of Management and Budget and U.S. General Services Administration, *1993 Catalog of Federal Domestic Assistance* (Superintendent of Documents: Washington, D.C., 1993), vol. 1, pp. 315–51 (hereafter cited as *Catalog of Federal Domestic Assistance*). This estimate does not include Federal assistance dispensed by the Bureau of Indian Affairs.

[2] U.S. Department of the Interior, "Fiscal Year 1994 Civil Rights Implementation Plan," FY 1993 Workload and Performance Data, p. 1 (hereafter cited as DOI FY 1994 Implementation Plan).

[3] Ibid.

[4] U.S. Department of Interior, Office for Equal Opportunity, "Interior Personnel Currently Involved in Title VI Compliance and Enforcement Activities by Bureau as of May 1995," information submitted to the Commission, May 10, 1995.

[5] Equal opportunity specialists employed in the "GS–360: Federal Civil Rights Compliance Occupational Series."

[6] E. Melodee Stith, Director, Office for Equal Opportunity, U.S. Department of the Interior, letter to Mary Francis Berry, Chairperson, U.S. Commission on Civil Rights, April 25, 1995, attachment, p. 2 (hereafter cited as Stith letter, attachment). The remainder of the staff years are performed by equal employment opportunity specialists and DOI program administration staff. *See* Melvin C. Fowler, Supervisory Equal Opportunity Specialist, Office for Equal Opportunity, U.S. Department of the Interior, interview in Washington, D.C., May 4, 1994, p. 1 (hereafter cited as Fowler interview). DOI's 1994 Civil Rights Implementation Plan indicates that the Department has approximately 49 FTEs committed to enforcement of Title VI and other related civil rights statutes. *See* DOI FY 1994 Implementation Plan, p. 4.

[7] U.S. Office of the Federal Register, National Archives and Records Administration, *The United States Government Manual 1993/1994* (Superintendent of Documents: Washington, D.C., 1993), pp. 347–61.

[8] *Catalog of Domestic Federal Assistance*, p. 348.

- The *historic preservation fund grants in aid* program provides matching grants to States to expand the National Register of Historic Places and for the identification, evaluation, and protection of historic properties. It also provides grants to the National Trust for Historic Preservation for its activities. Since 1968, the Historic Preservation Fund has awarded over $656 million to States, which have, in turn, issued subgrants to 900 subrecipients. In fiscal year 1994, the historic preservation fund provided $36 million in grants.[11]

- The *urban park and recreation recovery program* provided project grants to eligible cities and counties for rehabilitation of recreation areas and facilities, demonstration of innovative approaches to improving park management and recreation opportunities, and for recreation planning.[12] Although Congress no longer funds this program, Title VI still applies to the program's recipients. The program has funded more than 1,050 projects since the program's beginning in the 1980s.[13]

The Fish and Wildlife Service administers two major programs that, from the effective date of Title VI to May 1994, have involved the disbursement of $12 billion in Federal aid:[14]

- The *sport fish restoration* program funds projects aimed at restoring and managing sport fish populations or improving sport fishing.[15] The Fish and Wildlife Service distributes the funds through formula grants to State fish and wildlife agencies. In fiscal year 1994, the program provided $162 million in grants.[16]

- The *wildlife restoration* program funds formula grants to State fish and wildlife agencies for restoring or managing wildlife populations and for hunter safety programs.[17] The State agencies have used these funds to purchase more than 50 million acres of wildlife habitat and train more than 700,000 hunters on safe hunting principles.[18] In fiscal year 1994, the program provided $153 million in grants.[19]

The Bureau of Reclamation funds irrigation systems through the distribution system loans program and the irrigation systems rehabilitation and betterment program and funds water reclamation projects through the small reclamations projects program.[20]

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[9] Melvin C. Fowler, Team Leader, Office for Equal Opportunity, letter to Frederick D. Isler, Deputy Assistant Staff Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, May 26, 1994, p. 1 (hereafter cited as Fowler letter).

[10] *Catalog of Domestic Federal Assistance*, p. 348.

[11] Ibid., pp. 342–43.

[12] Ibid., pp. 350–51.

[13] Fowler letter, p. 1.

[14] Ibid., p. 2.

[15] *Catalog of Domestic Federal Assistance*, pp. 328–29.

[16] Ibid.

[17] Ibid., p. 332.

[18] Fowler letter, p. 2.

[19] *Catalog of Domestic Federal Assistance*, p. 332.

[20] Ibid., pp. 323–25.

## Organization, Budget, Staffing, and Workload of DOI's Civil Rights Enforcement Function

### Organization and Responsibilities of the Office for Equal Opportunity

The Office for Equal Opportunity (OEO) is responsible for enforcing Title VI in DOI's federally assisted programs and activities.[21] OEO is headed by a Director, who reports to the Deputy Assistant Secretary for Human Resources[22] and, thus, is several levels removed from the Secretary of the Interior. OEO's Director explained that she has ready access to both the Assistant Secretary for Policy, Budget, and Administration and the Deputy Assistant Secretary for Human Resources and that she participates in weekly meeting with both officials and bimonthly meetings with all office directors.[23] However, the organizational status of OEO's Director may limit her ability to participate actively in high-level policy meetings that affect external civil rights enforcement or in administrative decisions, such as budget and staffing allocation for external civil rights enforcement.[24]

In addition to enforcing Title VI, OEO is responsible for enforcing other Federal civil rights laws that prohibit discrimination in DOI's federally assisted and federally conducted programs.[25] It also is responsible for ensuring equal employment opportunity within the Department[26] and for ensuring compliance with Title II of the Americans with Disabilities Act of 1990.[27]

Reporting to OEO's Director are the Federal Employment Programs Staff, which is responsible for equal employment opportunity matters within the Department, and the Federal Financial Assistance Programs Staff, which is responsible for enforcing civil rights laws with respect to DOI's federally financed programs.[28] Because the internal and external civil rights staff are assigned to separate units within OEO, Title VI enforcement is protected from pressures to increase resources for internal civil rights enforcement.

OEO does not have separate units for policy development and monitoring and overseeing

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[21] U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of the Interior, Q. 20, p. 16 (hereafter cited as DOI Survey).

[22] Ibid., Q. 20. The placement of OEO within the Office of the Assistant Secretary for Human Resources may present a potential conflict of interest. The civil rights enforcement responsibility for matters such as ensuring equal opportunity in hiring, selections, promotions, transfers, and other internal employment affairs is in the office that manages such employment decisions.

[23] Stith letter, attachment, p. 4.

[24] OEO's Director stated that she participates actively in policy development at the Secretarial level, in the preparation of budget documents, in the allocation of resources and staffing, and in all other administrative functions affecting OEO. Ibid., p. 4. However, OEO provided the Commission with no specific information regarding to what extent the Director is involved in such activities and provided no supporting documentation.

[25] DOI Survey, Q. 22, pp. 16–17. The statutes include Title IX of the Education Amendment Act of 1972, 20 U.S.C. §§ 1681–1688 (1988); section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988 & Supp. V 1993); and the Age Discrimination Act of 1975, 42 U.S.C. §§ 6101–6107 (1988). Ibid.

[26] DOI FY 1994 Implementation Plan, p. 3.

[27] 42 U.S.C. §§ 12,131–12,134 (Supp. V 1993).

[28] *See* U.S. Department of Interior, Office for Equal Opportunity, "Organizational Chart—Fiscal Year 1994"; DOI FY 1994 Implementation Plan, pp. 3–4. *See also* Stith letter, attachment, p. 4.

DOI's bureaus.[29] In addition, OEO does not have legal staff. Instead, DOI's Office of the Solicitor provides legal guidance on Title VI matters.[30] In particular, DOI's must rely on review and approval by the Office of the Solicitor to revise and update Title VI regulations and to draft Title VI enforcement procedures and guidelines. Consequently, OEO may be delayed by the Office of the Solicitor in making critical improvements to its Title VI implementation and enforcement program.

In fiscal year 1991, OEO was decentralized to assume primarily a coordination and policy development role. It is now responsible for overall direction, policy development, and oversight of bureaus' Title VI enforcement efforts, namely, the National Park Service, the Fish and Wildlife Service, and the Bureau of Reclamation. With the exception of complaint investigations, OEO no longer conducts operational Title VI enforcement activities.[31] OEO explained that the results of the decentralization are that the efforts of more personnel are coordinated for civil rights enforcement in DOI's programs; the bureaus administering such programs are directly accountable for civil rights enforcement; bureaus' regional staff work more closely with program "customers"; and bureau staff are more familiar with the programs they administer.[32] OEO further explained that the decentralization of its functions will increase the quality and efficiency of compliance and enforcement activities. Specifically, OEO's Director stated that "[e]mpowering front-line employees and allowing them to interact directly with customers facilitates invaluable partnership arrangements among recipients and beneficiaries in effectively enforcing the requirements of Title VI."[33] However, to effectuate uniform and comprehensive Title VI enforcement, those bureau program administration staff must be regularly and thoroughly trained and monitored by OEO.[34] OEO provided no indication or explanation of a regular and systematic training program or oversight and monitoring program.[35]

In 1995, OEO is reorganizing further its Federal Financial Assistance Programs and Federal Employment Staffs into a "team" structure. Under the new structure, "process managers" have replaced former supervisors. The stated purpose of this reorganization is to enable OEO to "carry out high quality service with cooperative resources throughout OEO in order to provide more efficient and effective customer service."[36] However, DOI did not provide the Commission with sufficient details to enable the Commission to evaluate the potential effectiveness of the reorganization plan.

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[29] OEO's role is limited to developing policy for, providing policy guidance and direction to, and monitoring and evaluating the performance of DOI's bureaus. The bureaus perform all operational equal opportunity duties, which are described as the Department's "day-to-day activities." *See* U.S. Department of the Interior, "Title VI Civil Rights Compliance and Enforcement Supporting Documentation," Future Direction, "Mission Statement for the Office of the Secretary, May 9, 1995 (hereafter cited as DOI Supporting Documentation).

[30] *See* DOI FY 1994 Implementation Plan, p. 6.

[31] U.S. Department of the Interior, "FY 1992 Civil Rights Implementation Plan," p. 12 (hereafter cited as DOI FY 1992 Implementation Plan).

[32] Stith letter, attachment, p. 5.

[33] Ibid., p. 6.

[34] *See* discussion in this chapter, p. 396.

[35] *See* discussion in this chapter, pp. 402–03.

[36] U.S. Department of Interior, Office for Equal Opportunity, "Title VI Study: Supplemental Submission," Nov. 30, 1994, Exhibit C, "Pilot Project to Decentralize the Operational Functions of the Departmental Office for Equal Opportunity to the Office of Surface Mining, Reclamation, and Enforcement," p. 2 (hereafter cited as DOI, Title VI Supplemental Submission). *See also* ibid., Exhibit D. OEO explained that to "improve customer focus and service," all of its civil rights enforcement programs are being reinvented. Stith letter, attachment, p. 4.

In addition to this reorganization, DOI's Title VI compliance and enforcement program, along with other civil rights functions, are currently participating in a National Performance Review Reinvention Laboratory.[37] That reinvention project will assist DOI in evaluating aspects of its civil rights programs that can be eliminated, combined, or improved to promote uniformity and efficiency. The goal is to evaluate DOI's existing regulations and operational procedures to ensure enforcement of civil rights laws in an efficient and effective manner.[38] However, the resulting restructuring should not pursue the goal of streamlining at the expense of maintaining sufficient staff and resources to achieve civil rights enforcement in DOI's federally sponsored programs and activities.

### Responsibilities of the DOI Bureaus

Under DOI's 1991 reorganization, OEO has delegated to the National Park Service, the Fish and Wildlife Service, and the Bureau of Reclamation, responsibility for all daily Title VI implementation and enforcement activities related to the Federal assistance programs they administer.[39] These activities include:

- securing recipient compliance
- conducting preaward and postaward compliance reviews
- investigating and resolving complaints
- providing technical assistance to applicants and recipients
- providing training to Federal and recipient personnel.[40]

The bureaus' equal opportunity offices generally perform these activities. However, the bureaus' grant-making offices remain responsible for many compliance procedures, such as preaward and postaward reviews.[41] For example, at the Fish and Wildlife Service, the Chief of the Office for Human Resources and his or her designated Federal assistance programs coordinator has overall responsibility for Title VI enforcement. However, the directors of Fish and Wildlife Service's regional offices are responsible for all daily Title VI enforcement activities in their regions.[42] Similarly, the National Park Service's Equal Opportunity Program has overall responsibility for the service's Title VI enforcement. However, National Park Service program staff perform complaint investigations and compliance reviews and provide technical assistance to funding recipients.[43]

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[37] DOI, Title VI Supplemental Submission, p. 2. To date, a civil rights compliance and enforcement team has been created, consisting of civil rights specialists, State and local government officials, a citizen representative, and a team leader. A facilitator and an eight-member management advisory group will assist the team's efforts. The product will be a report to the Vice President recommending modifications in "planning, quality control, and product and service delivery." U.S. Department of Justice, *Civil Rights Forum*, Spring 1995, p. 5.

[38] Stith letter, attachment, p. 5.

[39] Federally assisted programs of the National Geological Survey, the Office of Territorial Affairs, the Bureau of Indian Affairs, and the Bureau of Mines are covered, under an agreement with the U.S. Department of Justice and the U.S. Department of Education, by the Department of Education's Title VI program. Fowler interview, p. 2; Stith letter, attachment, p. 2.

[40] U.S. Department of the Interior, "Fiscal Year 1993 Civil Rights Implementation Plan," p. 5 (hereafter cited as DOI FY 1993 Implementation Plan); Fowler letter, attachment, "Description of Pilot Project to Decentralize the Operational functions of the Federal Financial Assistance Programs Division (FFAP) of the Office for Equal Opportunity."

[41] Ibid., pp. 11–2.

[42] *See* Mollie H. Beattie, Director, U.S. Fish and Wildlife Service, letter to Frederick D. Isler, Acting Assistant Staff Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, DATE (hereafter cited as DOI/FWS Title VI Response), attachment, U.S. Department of the Interior, U.S. Fish and Wildlife Service, "Federally Assisted Program Implementation Plan: Fiscal Years 1994–1997," pp. 3–4 (hereafter cited as DOI/FWS FY 1994 Implementation Plan).

DOI's other bureaus do not have Title VI enforcement responsibilities.[44] Although these other bureaus operate federally assisted programs,[45] DOI provided no evidence that it implements any proactive measures to ensure that these bureaus' federally assisted programs are operated in compliance with Title VI. OEO's Director stated that OEO remains responsible for ensuring Title VI compliance in all programs and activities operated by bureaus that have not been delegated Title VI enforcement responsibilities.[46] However, OEO did not provide the Commission with an explanation of the enforcement activities it implements to enforce Title VI in these programs. To the contrary, at present, OEO executes no operational Title VI compliance and enforcement activities, and only provides policy and guidance to DOI's bureaus.

According to DOI, it does not perform Title VI enforcement activities for the programs of its other bureaus primarily because these programs do not have readily identifiable beneficiaries.[47] However, the provisions of Title VI extend beyond prohibiting discrimination against identifiable beneficiaries and potential beneficiaries. According to OEO, "the requirements of Title VI are simply not applicable or necessary" either because several bureaus fund the same recipients,[48] because recipients are assisted by another Federal agency,[49] or because bureaus provide funds directly to States that are not designated for a particular program or activity.[50] OEO explained, for example, that "because the Minerals Management Service provides nonearmarked funds directly to State treasuries," such programs are not traceable to any specific program or activity, and thereby, not covered by Title VI.[51] However, although DOI has an agreement delegating responsibility to the Department of Education for enforcing Title VI for educational programs funded by DOI, it provided no evidence that it monitors the Department of Education's performance under this agreement. Furthermore, despite DOI's claim, Federal financial assistance programs

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[43] Roger G. Kennedy, Director, National Park Service, letter to Frederick D. Isler, Acting Assistant Staff Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, Dec. 7, 1994, p. 1 (hereafter cited as DOI/NPS Title VI Response).

[44] Fowler interview, p. 2. According to DOI, its national outreach and education campaign covers all of its federally assisted programs and bureaus. Furthermore, Title VI complaints are accepted and investigated for all programs and bureaus. DOI, Title VI Supplemental Submission, p. 2.

[45] Fowler letter, p. 2. For instance, the Office of Surface Mining, Reclamation and Enforcement administers three Federal assistance programs, the State Regulatory Grants Program, the State Reclamation Grants Program, and the Federal Reclamation Program. Ibid.

[46] Stith letter, attachment, p. 3. That excludes those programs operated by bureaus that have been delegated Title VI responsibilities, namely the National Park Service, the Fish and Wildlife Service, and the Bureau of Reclamation.

[47] Fowler interview, p. 2.

[48] Stith letter, attachment, p. 3. OEO's Director explained that many recipients receive funds from multiple DOI sources are already covered by Title VI through one of the three bureaus with active Title VI enforcement programs. For such programs, OEO does not implement additional Title VI enforcement measures.

[49] Ibid., pp. 2, 3. According to OEO, the Geological Survey, the Office of Territorial Affairs, the Bureau of Mines only fund educational programs for public schools. Therefore, DOI has implemented a cooperative civil rights enforcement agreement with the Department of Education to minimize duplication in enforcement efforts. Ibid. p. 2; *see* Department of Education, Department of the Interior, Department of Justice, "Delegating Certain Civil Rights Responsibilities for Educational Institutions," 57 Fed. Reg. 115 (1992). OEO also explained that with the exception of these educational programs, the Bureau of Indian Affairs does not operate programs subject to Title VI's requirements, because such programs are operated on a *de jure* segregated basis or on a Tribal government basis. Stith letter, p. 3.

[50] Stith letter, pp. 2, 3.

[51] Ibid.

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receiving nonearmarked funds (such as block grant programs) are covered by Title VI.[52]

DOI provided the Commission with a copy of a proposal for a pilot project that would have given Title VI enforcement responsibilities to the Office of Surface Mining.[53] However, DOI never implemented the project.[54] DOI also submitted a 1991 draft proposal for a pilot civil rights enforcement program for the Bureau of Indian Affairs.[55] However, DOI did not indicate that it has ever implemented this proposal. DOI noted that the Bureau of Indian Affairs administers its programs for Native Americans only, but Title VI generally does not apply to them.[56]

### Budget, Staffing, and Workload

DOI's appropriation does not have an earmark for its civil rights office.[57] The agency also provided no indication that it specifically allocates staffing and resources or tracks expenditures related to external civil rights enforcement activities. Therefore, it may be unable to monitor its Title VI resource needs. The failure to maintain such a monitoring system may limit OEO's ability to maintain existing and increase budget, staffing, and resources for implementation and enforcement of Title VI.

Moreover, the failure to monitor resource needs may explain the decrease in OEO's budget, staffing, and resources. OEO's budget decreased as DOI reorganized its civil rights enforcement function to transfer enforcement and compliance responsibility to its bureaus.[58] Although DOI maintains that this reorganization did not lead to a diminution in its external civil rights staffing, DOI replaced external civil rights staff with internal civil rights and program administration staff.[59] In 1995, DOI has only five external civil rights enforcement staff.[60] DOI's internal equal opportunity staff and program management staff, the majority of whom are located in DOI's bureaus, are primarily responsible for implementation, compliance, and enforcement activities related to DOI's federally assisted programs.[61] Thus, DOI's trained external civil rights enforcement staff decreased from 10 to 5 since the early 1980s.[62]

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[52] *See* chapter 3, p. 77, for a discussion of Title VI's coverage of block grant programs.

[53] DOI, Title VI Supplemental Submission, p. 2.

[54] Fowler interview, p. 2. According to OEO's Director, OEO plans to delegate Title VI enforcement responsibility to the Office of Surface Mining. Stith letter, attachment, p. 6

[55] DOI, Title VI Supplemental Submission, Exhibit C, Melvin C. Fowler, Equal Opportunity Specialist, memorandum to Director of Office for Equal Opportunity, "BIA Pilot Civil Rights Compliance and Enforcement Program," Dec. 5, 1991 (hereafter cited as DOI, BIA Pilot Program).

[56] Fowler interview, p. 2. According to DOI, Title VI applies to Bureau of Indian Affairs programs in situations where one-half-blooded Native Americans are treated differently from full-blooded Native Americans, because Title VI protects against discrimination on the basis of an individual's color. DOI, BIA Pilot Program, p. 1.

[57] DOI Survey, Q. 29, p. 20. However, DOI indicated that its civil rights budget was $299,000 in 1976; $596,000 in 1981; $4.1 million in 1992; and $5.2 million in 1993. Furthermore, DOI indicated that these amounts also constituted its expenditures on Title VI enforcement. *See* DOI Survey, Q. 33, p. 23 and Q. 34, p. 24.

[58] Fowler letter, p. 3.

[59] Ibid.

[60] Stith letter, attachment, p. 1. External civil rights enforcement staff refers to equal opportunity specialists employed in the "GS–360: Federal Civil Rights Compliance Occupational Series."

[61] Fowler interview, pp. 1, 3. *See also* Stith letter, attachment, p. 1. The Director of OEO explained that program administration staff are involved in enforcing civil rights statutes in DOI's federally assisted programs and activities because reduced budgets and decreased staffing require DOI to employ "shared services." Ibid. *See* discussion in this chapter, p. 391.

[62] *See* ibid., pp. 3–4. OEO has requested additional funding and staffing for civil rights enforcement work in its fiscal year 1996 budget request. Stith letter, attachment, pp. 6–7.

OEO currently has two of the five external civil rights staff members, although one of the two is assigned to the National Park Service.[63] The other three external civil rights staff members are located in the U.S. Fish and Wildlife Service.[64] None of the Department's other bureaus has any external civil rights staff.[65] Staff reductions are reducing further the number of program administration staff available to perform civil rights enforcement activities.[66]

Although DOI's external civil rights staff has decreased, its civil rights responsibilities have increased. In particular, DOI is a designated Federal agency for Title II of the Americans with Disabilities Act of 1990.[67] DOI indicated that the Department's responsibilities under section 504 of the Rehabilitation Act of 1973[68] and the Americans with Disabilities Act have affected its ability to enforce Title VI.[69]

## Regulations, Guidelines, Policies, and Procedures

### Regulations

DOI's Title VI regulations[70] are virtually identical to those of the Department of Health, Education, and Welfare, currently the Department of Education's which the U.S. Department of Justice designated as model regulations.[71] They prohibit all of the same types of discrimination.[72] Therefore, DOI's regulations include all the specific forms of discrimination listed in the Commission's 1966 *Compliance Officer Manual*. DOI's Title VI regulations also embody the same provisions with respect to employment discrimination. They prohibit discriminatory employment practices in the administration of programs when providing employment is the primary objective of the Federal financial assistance and when the practice may adversely impact upon that program or activity's participants and beneficiaries, regardless of the nature of the program.[73]

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[63] Fowler interview, p. 1. Until recently, the National Park Service had a trained civil rights staff of approximately 2.5 FTEs in its headquarters office; however, all of these staff left when the Department reduced its staff size. Ibid.

[64] Fowler letter, p. 3. The Fish and Wildlife Service's fiscal year 1994 Civil Rights Implementation Plan indicates that the bureau has four, rather than three, full-time civil rights employees in its headquarters office. Human Resources and Federal Aid staff members in the service's regional offices perform the remainder of its civil rights responsibilities, but only as a collateral duty to program administration responsibilities. DOI/FWS FY 1994 Implementation Plan, p. 4.

[65] Fowler letter, p. 3. Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12,131–12,134 (Supp. V 1993). According to November 1994 information submitted to the Commission by the Bureau of Reclamation, the Bureau of Reclamation has one full-time civil rights compliance manager. The information does not indicate whether the manager is a trained external equal opportunity specialist. U.S. Department of the Interior, Bureau of Reclamation, "Civil Rights Compliance (Title VI)," information submitted to the U.S. Commission on Civil Rights, Nov. 30, 1994 (hereafter cited as DOI/WBR Title VI Response).

[66] *See* DOI/NPS Title VI Response, p. 2.

[67] DOI FY 1994 Implementation Plan, p. 2; *see also*, Fowler interview.

[68] 29 U.S.C. § 794 (1988 & Supp. V 1993).

[69] DOI Survey, Q. 28, p. 20. *See also* DOI/NPS Title VI Response, pp. 2, 3. OEO's Director maintained that its enforcement of the Americans with Disabilities Act of 1990 and section 504 of the Rehabilitation Act of 1973 has not affected its ability to also enforce Title VI. She explained that while OEO's civil rights complaint inventory substantiates a steady and significant decrease in Title VI complaints, it also reflects an increase in disability rights complaints. Therefore, OEO inevitably has had to devote more resources to addressing the latter. However, she further explained that because civil rights responsibilities for each of these civil rights provisions are performed by the same staff, enforcement activities related to section 504 and the Americans with Disabilities Act have also involved Title VI. She stated that, accordingly, OEO is assessing the extent to which disability rights and age nondiscrimination measures may also involve violations of Title VI. As such, she stated that she believed that OEO's Title VI enforcement efforts had been enhanced by its additional civil rights responsibilities related to other statutes. Stith letter, attachment, p. 7.

[70] 43 C.F.R. § 17 (1993).

[71] 34 C.F.R. Part 100 (1993).

[72] 43 C.F.R. § 17.3 (1993).

### Guidelines

DOI has complied only partially with the Department of Justice requirement that Federal agencies publish guidelines for each federally assisted program.[74] DOI provided the Commission with copies of Title VI guidelines for the National Park Service's land and water conservation fund program[75] and its national register program,[76] as well as Title VI guidelines for the Bureau of Land Management's federally assisted programs.[77] DOI provided no guidelines for the Fish and Wildlife Service,[78] the Bureau of Reclamation, or the other bureaus for which DOI has active Title VI enforcement programs. Furthermore, none of the guidelines submitted appears to have been updated recently. In particular, the guidelines for the National Park Service programs do not reflect the 1991 reorganization transferring many civil rights compliance and enforcement responsibilities from OEO to the National Park Service.

In addition to the Title VI guidelines, DOI provided the Commission with copies of a civil rights enforcement plan for the National Park Service's historic preservation fund grants-in-aid program[79] and a draft plan for its surplus Federal real property and rivers and trails conservation assistance programs.[80] These enforcement plans are more current than the guidelines, in that they reflect the present decentralized structure of DOI's civil rights enforcement. However, they do not constitute guidelines. In particular, they do not describe specific discriminatory conduct prohibited by Title VI in each of DOI's federally funded programs and activities.

### Policies

DOI has not regularly issued policy statements or directives. Since 1990, DOI has drafted legal memoranda on "The Applicability of Title VI of the Civil Rights Act to Non-Citizens," which concludes that the Bureau of Mines cannot fund scholarships restricted to U.S. citizens,[81] and on "The State of Maine's 'Resident Only' Hunting Policy," which concludes that the State of Maine may restrict hunting licenses to State residents under Title VI.[82] OEO also has issued intermittent and miscellaneous policy memoranda concerning issues, such as Title VI's prohibition of disparate impact discrimination,[83] DOI's delegation agreement concerning its educational programs,[84] the collection of assurances of nondiscrimination from funding recipients,[85] and the eradication of discrimination in federally funded parks and other recreational facilities.[86]

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[73] *Id.* § 17.3(c)(3). *See* chapter 5, p. 191, for a discussion of the Department of Education's regulatory provisions respecting employment discrimination.

[74] 28 C.F.R. § 42.404 (1993).

[75] DOI, Title VI Supplemental Submission, Exhibit H, LWCF Grants Manual, chapter 650.9, "Title VI Guidelines."

[76] Ibid., Exhibit I, National Register Program Guideline, chapter 10, "Title VI and Section 504 Compliance Requirements."

[77] Ibid., Exhibit H, "Title VI Guidelines for Federally Assisted Programs of the Bureau of Land Management, U.S. Department of the Interior."

[78] *See* DOI/FWS Title VI Response, p. 4. The Fish and Wildlife Service reported that the service has a Title VI guidelines entitled "Title VI and Section 504 Guidelines for the U.S. Fish and Wildlife Service. The service did not provide the Commission with a copy of the guideline.

[79] DOI Title VI Supplemental Submission, Exhibit H, National Park Service Civil Rights Enforcement Plan for the Historic Preservation Fund Grants-in-Aid Program."

[80] Ibid., Exhibit C, National Park Service, Draft Civil Rights Enforcement Plan for the Surplus Federal Real Property and Rivers and Trails Conservation Assistance Program."

[81] Daniel G. Shillito, Associate Solicitor, Division of General Law, Office of the Solicitor, U.S. Department of the Interior, memorandum to the Director, Office for Equal Opportunity, U.S. Department of the Interior, "The Applicability of Title VI of the Civil Rights Act to Non-Citizens," Dec. 27, 1990.

[82] Robert E. Walker, Assistant Solicitor, Equal Opportunity Compliance and Labor Law, Office of the Solicitor, U.S. Department of the Interior, memorandum to Carmen Maymi, Director, Office for Equal Opportunity, U.S. Department of the Interior, "State of Maine's 'Resident Only' Hunting Policy," June 29, 1993.

However, OEO has not issued policy memoranda addressing significant substantive issues concerning Title VI enforcement. For example, until the Civil Rights Restorations Act of 1987, there was some uncertainty as to whether a Federal agency could terminate Federal funds to an entire institution or entity when only one part or program within that institution or entity was found in noncompliance with Title VI. Case law had implied that Title VI's nondiscrimination provision covered only the specific program within an institution receiving Federal funds, but did not address the extent of an agency's termination authority.[87] The act clarified the issue of termination authority and restored the principle that an agency may terminate funds not only if discrimination is "pinpointed" to the use of the funds, but also if the use is "infected" with discrimination elsewhere in the operation of the recipient.[88] OEO also has issued no policy directives elaborating the extent to which Title VI proscribes discriminatory employment practices or clarifying the extent to which funding recipients are authorized to implement Title VI proactively.

### Procedures

DOI provided the Commission with Part 506 of DOI's departmental manual, which describes the Department's Title VI enforcement procedures.[89] However, since DOI last updated Part 506 in 1974,[90] it does not reflect the Department's current Title VI procedures. In addition, many sections of the copy provided to the Commission were manually deleted, including all sections referring to affirmative action plans and preaward reviews.[91] DOI is in the process of revising its manual. It plans to issue revised chapters in the form of "guidebooks" and to distribute these chapters to the bureaus as they are revised.[92]

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[83] DOI Supporting Documentation, E. Melodee Stith, Director, Office for Equal Opportunity, U.S. Department of the Interior, Equal Opportunity Memorandum 94–16, Sept. 1, 1994.

[84] DOI Supporting Documentation, Carmen Maymi, Director, Office for Equal Opportunity, U.S. Department of the Interior, Equal Opportunity Memorandum 92–41, July 10, 1992.

[85] DOI Supporting Documentation, Carmen Maymi, Director, Office for Equal Opportunity, U.S. Department of the Interior, Equal Opportunity Memorandum 93–02, Nov. 8, 1992.

[86] DOI Supporting Documentation, James M. Ridenour, Director, Office for Equal Opportunity, U.S. Department of the Interior, memorandum for all bureau directors, Feb. 2, 1990.

[87] Grove City College v. Bell, 465 U.S. 555 (1984). The Supreme Court found that Title IX coverage was limited to the specific program receiving Federal assistance. *Id. See* chapter 2, pp. 36–40, for further discussion.

[88] U.S. Congress, Senate, Committee on Labor and Human Resources, *Civil Rights Restoration Act of 1987*, 100th Cong., 2d sess., S. Rep. No. 64, p. 20, *reprinted in* 1988 U.S.C.C.A.N. 3, 22. *See also* Board of Pub. Instruction v. Finch, 414 F.2d 1068 (5th Cir. 1969).

[89] DOI, Title VI Supplemental Submission, Exhibit C, Departmental Manual, Federal Assistance Programs, Part 506, Equal Opportunity Under Title VI.

[90] Ibid. The manual was last updated on May 10, 1994.

[91] *See, e.g.*, ibid., pp. 506.1.3, 506.41(13)(a), 506.2.4A(7). A handwritten note on the Commission's copy indicates that DOI does not currently perform preaward reviews. Ibid., p. 506.1.4L.

DOI also provided the Commission with a Title VI procedures manual for the Bureau of Land Management.[93] The Bureau of Land Management manual is undated, but was apparently issued in the early 1980s.[94]

## Process of Title VI Enforcement for Direct Recipients

The Title VI enforcement activities for most DOI bureaus consists mainly of accepting and processing Title VI complaints. Only the National Park Service, the Fish and Wildlife Service, and, to a limited extent, the Bureau of Reclamation, have active Title VI programs. Because OEO has delegated Title VI responsibilities to those bureaus, they perform most of the daily Title VI enforcement activities.[95] However, the bureaus' program staff execute the enforcement activities only as a collateral duty in conjunction with program reviews, without adequate oversight or guidance from OEO.[96]

### OEO Oversight of the Bureaus

OEO has delegated to the bureaus Title VI enforcement relative to the bureaus' programs. Therefore, staff in each of these bureaus are responsible for conducting preaward and postaward compliance reviews and data collection and analysis related to Title VI enforcement in each of federally assisted programs the bureau administers. Although OEO's role is to provide guidance and oversight to staff in the three bureaus that have been delegated Title VI responsibilities, its efforts are inadequate. Specifically, a staff member of OEO indicated that OEO limits its review of the bureaus to an annual desk-audit review of self-assessment reports submitted to OEO by each of the bureaus. Furthermore, although OEO reviews the bureaus' letters of finding, it does not review their compliance review files or investigation files for quality.[97] Overall, OEO did not indicate any regular or systematic monitoring or evaluation of bureaus' Title VI implementation and enforcement activities, other than the annual collection of self-assessment reports submitted to OEO by each of the bureaus.[98]

The delegation of DOI's Title VI enforcement responsibility to the bureaus presents several concerns. First, the decentralization restricts

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[92] Stith letter, attachment, p. 9.

[93] DOI, Title VI Supplemental Submission, Exhibit H, United States Department of the Interior, Bureau of Land Management, "1813—Nondiscrimination in Uses of Lands and Resources."

[94] *See* ibid., Manual Transmission Sheet (handwritten date of July 7, 1983) and p. 4 (refers to a Solicitor's memorandum dated June 23, 1982).

[95] Fowler interview, p. 2.

[96] Ibid.

[97] Ibid., p. 3. The Director of OEO stated that it retains full enforcement and oversight authority over bureaus' Title VI enforcement activities and explained the mechanisms it utilizes to ensure that bureaus adequately enforce civil rights include imposing performance standards on bureau directors to implement civil rights provisions, including Title VI; requiring bureaus to develop plans to implement civil rights requirements; monitoring "every action and decision" a bureau makes; and providing bureau personnel with training on civil rights requirement. Stith letter, attachment, p. 5. However, OEO's Director provided the Commission with no documentation or specific description of its monitoring mechanisms, such as examples of the "plans" bureaus are required to develop, ways in which OEO 'monitors every action and decision," or the type and amount of civil rights enforcement training provided to bureau staff. OEO's Director also stated that it monitors "all letters of findings, decisions, investigations, compliance reviews, the frequency and types of complaints processed, and other related Title VI matters" executed by the bureaus. Ibid., p. 9. However, again, she failed to explain or demonstrate by what means and how often such enforcement mechanisms are monitored.

[98] As evidence of its monitoring activities, OEO only submitted miscellaneous memoranda concerning intermittent management reviews and evaluations. *See* DOI Supporting Documentation.

OEO's ability to control and oversee the Department's Title VI enforcement program. Currently, no frequent or regular monitoring system exists to ensure that the bureaus successfully perform their Title VI responsibilities. Second, the assignment of daily Title VI enforcement activities to the bureaus' equal opportunity offices may increase the likelihood that a bureau focuses more attention on internal equal opportunity issues, thereby compromising the Title VI enforcement program. Third, assigning critical Title VI enforcement responsibilities to program administration staff with limited, if any, external civil rights enforcement training and who perform Title VI activities in conjunction with regular program management responsibilities greatly increases the risk that DOI will not discover violations of Title VI. Fourth, because the program and grant-making offices have responsibility for such enforcement mechanisms as compliance reviews and investigations, the close relationship between these offices and program recipients or grantees may hinder achievement of compliance and the imposition sanctions.

OEO had concerns about the quality of the bureau's compliance reviews.[99] The OEO staff added that Title VI enforcement in both bureaus was problematic because the same staff administers the grants and contracts and ensures compliance with Title VI.[100] Over the years, "a very close marriage between the granting agencies and the State [recipients]" has developed, creating difficulties for the granting agencies in performing their Title VI responsibilities.[101] The Director of the National Park Service's equal opportunity program disagreed. He indicated that a close relationship between State recipients and the National Park Service has enhanced the service's ability to enforce Title VI, both because State recipients accept some of the workload that the National Park Service otherwise would perform and because the close relationship facilitates informal resolution of Title VI problems.[102]

### Preaward Reviews

Overall, DOI, through its three bureaus with responsibility for Title VI enforcement activities, conducts many preaward reviews. For example, in fiscal year 1993, DOI conducted 834 preaward reviews for 841 awards of Federal financial assistance.[103]

DOI's 1994 Civil Rights Implementation Plan indicates that OEO conducts preaward reviews "in select program areas," including State and local park and recreation programs and activities, State and local historic preservation programs, State hunter safety education programs, State fish and wildlife restoration programs, and the surplus property and rivers and trails conservation assistance programs.[104] OEO indicated that the National Park Service is the only bureau that conducts preaward reviews.[105] However, DOI's survey response indicated that the Fish and Wildlife Service also conducts preaward reviews, but because recipients generally receive aid on a continuous basis, reviews of these recipients are "relatively perfunctory."[106] In assessing an application for Federal financial assistance, the Fish and Wildlife Service uses a "Checklist for Pre-Award Compliance Review."[107] The checklist is based on a very restricted set of information on the application, including:

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[99] Fowler interview, p. 2. *See* DOI/FWS Title VI Response. However, unlike the National Park Service and the Bureau of Reclamation, the Fish and Wildlife Service provided the Commission with a substantial response to the Commission's request for information on the service's Title VI enforcement program which indicates that the Fish and Wildlife Service, at least, has a working Title VI enforcement program.

[100] Fowler interview.

[101] Ibid.

[102] DOI/NPS Title VI Response, pp. 3–4.

[103] Ibid., Q. 41, p. 30.

[104] DOI FY 1994 Implementation Plan, p. 5.

[105] DOI Survey, Q. 42, p. 32.

- a description of the project to be funded,
- an indication of whether the applicant undertakes formal public notification of the complaint procedure,
- an indication of whether the applicant has a formal complaint processing procedure,
- information on any previous complaints filed against the applicant,
- an indication of whether the applicant submitted a civil rights assurance,
- the date of the last compliance review of the applicant, and
- a brief discussion of any problems and corrective actions taken.[108]

The Bureau of Reclamation, which OEO recently assigned Title VI responsibilities, has not yet developed its compliance program; consequently, it has not yet conducted preaward reviews.[109]

### Postaward Desk-Audit Reviews

DOI seldom performs postaward desk-audit reviews. For example, DOI reported conducting a total of eight such reviews in fiscal year 1993.[110] The Department did not specify how many reviews, based on the total, each of the three bureaus conducted.[111]

OEO's Director explained that DOI considers desk-audit reviews to be an "unreliable approach" to determining recipient compliance with Title VI. She explained that desk-audit reviews do not provide for adequate examination of staffing practices and voluminous recipient documentary information, including compliance reports and printed program materials, and ascertaining the extent to which certain types of federally funded facilities are desegregated.[112] Although onsite investigations may enable agencies to collect certain types of evidence better and to determine directly, through interviews and onsite observations, whether recipients are in compliance with the requirements of Title VI, given OEO's and bureaus' limited staffing and resources, postaward desk-audit reviews might serve as a more efficient means of initially ascertaining recipient compliance. For example, all documentary materials considered in its postaward compliance reviews, such as statistical evidence of racial or ethnic disparities in program participation, could be examined by a desk-audit review. Such materials do not need to be gathered onsite. Desk-audit reviews could, at least, serve as a screening process for ascertaining recipients that require further onsite investigation, such as an examination of facilities and interviewing of recipient staff, program participants, and members of affected communities.

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[106] DOI Survey, Q. 42, p. 32. Fish and Wildlife Service preaward reviews "consist of the acquisition of the required civil rights assurance(s), and onsite inspections, if deemed appropriate." DOI/FWS FY 1994 Civil Rights Implementation Plan.

[107] DOI/FWS FY 1994 Implementation Plan, attachment G.

[108] Ibid.

[109] DOI Survey, Q. 42, p. 32. *See also*, DOI/WBR Title VI Response. In information submitted to the Commission in November 1994, the Bureau of Reclamation did not indicate that it had conducted any preaward reviews.

[110] Ibid., Q. 45, p. 34. *See also*, DOI FY 1994 Implementation Plan, FY 1993 Civil Rights Workload and Performance Data, p. 3.

[111] The Fish and Wildlife Service reported conducting 18 postaward reviews in fiscal year 1993, 10 of which were onsite investigations; however it did not identify whether any were Title VI compliance reviews. DOI/FWS FY 1994 Implementation Plan, Performance and Workload data, p. 8.

[112] Stith letter, attachment, p. 10.

### Onsite Compliance Reviews

DOI's fiscal year 1994 Civil Rights Implementation Plan characterizes onsite postaward civil rights compliance reviews as an "integral part of the Department's most user-oriented programs," including the land and water conservation fund program, the urban park recreation and recovery program, the historic preservation State grants program, and the fish and wildlife Federal grants-in-aid programs.[113] However, the Department does not conduct postaward reviews of its other federally assisted programs.

DOI reported that its bureaus completed 5,150 onsite compliance reviews in fiscal year 1993.[114] DOI's compliance reviews are not comprehensive reviews conducted by external civil rights staff. Instead, staff for the National Park Service and the Fish and Wildlife Service's federally assisted programs[115] perform the reviews during the course of their regular project inspections.[116]

This type of review has several serious deficiencies:

- It is not conducted by civil rights staff who understand the requirements of Title VI and who have experience uncovering illegal discrimination.
- It is limited in scope to the types and amount of information that can easily be discovered during the course of a project inspection, essentially information indicated on a civil rights checklist.[117]
- It reviews only the project within a system which received Federal funds, rather than reviewing the entire system, as required by Title VI under the Civil Rights Restoration Act.[118]

The Director of the National Park Service's equal opportunity program indicated that his office does not have the resources to conduct compliance reviews for the National Park Service's nearly 40,000 grants and must necessarily rely on program staff to conduct such reviews. He maintained that the program staff were better equipped to conduct such reviews because of their program knowledge and experience.[119] Nevertheless, the fact that only 12 of the 5,150 reviews completed by DOI in 1993 resulted in findings of compliance or noncompliance[120] may indicate that DOI's reviews are not sufficiently comprehensive to discover Title VI compliance violations.

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[113] DOI FY 1994 Implementation Plan, p. 5.

[114] Ibid., Q. 68, p. 44. This number was derived from reviews conducted by DOI bureaus, as well as by State recipients of subrecipients of State-administered programs, such as block grants and continuing State programs. OEO stated that it "periodically" reviews the enforcement actions of State recipients. Stith letter, attachment, p. 10.

[115] *See* DOI/WBR Title VI Response. The Bureau of Reclamation's response to the Commission's request for information on the bureau's Title VI enforcement program indicates that the Bureau has not yet begun to conduct compliance reviews.

[116] Fowler interview. *See also* DOI/FWS 1993 Implementation Plan, pp. 4, 9. The Fish and Wildlife Service's fiscal year 1993 Civil Rights Implementation Plan indicates that the Fish and Wildlife Service reviews are conducted by regional Division of Financial Assistance and Human Resources compliance officers, under guidance from the Chief of the Office of Human Resources. These officers perform their civil rights responsibilities as a collateral duty. *See also* DOI/NPS Title VI Response, p. 2. *See also* DOI, Title VI Supplemental Submission, Exhibit C, National Park Service, "Civil Rights Enforcement Plan for the Surplus Federal Real Property and Rivers and Trails Conservation Assistance Program," p. 4. For this program, regional office program staff are directed to "conduct post-transfer inspections as part of the periodic compliance inspections for surplus Federal real property" and to "review civil rights compliance during any rivers and trails technical assistance project reviews, training sessions, or other program activities." Ibid. *See also* DOI, Title VI Supplemental Submission, Exhibit H, National Park Service, "Civil Rights Enforcement Plan for the Historic Preservation Fund Grants-in-Aid Program," pp. 2, 4. For this program, postaward civil rights reviews are conducted by regional office staff "as part of periodic State Program Reviews." Ibid.

[117] *See* p. 387 in this chapter for a discussion of "Checklist for Pre-Award Compliance Review."

[118] *See* DOI Title VI Supplemental Submission, Exhibit E, Department of the Interior, Reinvention Laboratory Proposal for Civil Rights Compliance Reviews, Office for Equal Opportunity, p. 1.

### Complaint Investigations

The civil rights staff of the National Park Service, the Fish and Wildlife Service,[121] and the Bureau of Reclamation[122] conduct complaint investigations, with OEO issuing final determinations of violations and compliance.[123]

OEO has received an increasing number of civil rights complaints during the years. However, few of these complaints have been Title VI complaints. For example, the National Park Service receives an average of six Title VI complaints each year, but it is receiving an increasing number of complaints under section 504 of the Rehabilitation Act.[124] Out of 127 civil rights complaints received by OEO in fiscal year 1993, only 7 alleged Title VI violations.[125] The Department's limited efforts in outreach and education may explain, in part, why OEO has received so few Title VI complaints. If applicants, beneficiaries, and program participants are unaware of their rights under the law, they will be less likely to file complaints.[126]

OEO's investigation resulted in a no-cause finding for six of the seven complaints, with the final decision on one complaint still pending at the time that DOI completed its survey.[127] Although OEO staff maintained that the agency's complaint investigations are comprehensive,[128] the fact that no complaint investigations resulted in cause findings may indicate that the investigations are cursory. If civil rights staff conducted thorough investigations, they would be more likely to uncover legitimate discriminatory claims and make findings of cause.[129]

OEO has created a database to track all Title VI complaints. That system records opening, closing, and resolution dates and any planned or actual action taken.[130]

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[119] DOI/NPS Title VI Response, pp. 2, 4.

[120] DOI Survey, Q. 68, p. 44.

[121] *See* DOI/FWS FY 1994 Implementation Plan, Fiscal Year 1993 Civil Rights Workload and Performance Data. In fiscal year 1993, the Fish and Wildlife Service received a total of 40 civil rights complaints, 5 of which were Title VI complaints. The Bureau began the year with a backlog of 14 complaints and ended the year with a backlog of 5 complaints.

[122] *See* DOI/WBR Title VI Response, p. 1. The Bureau of Reclamation indicated that it had not yet received any Title VI complaints.

[123] DOI Survey, Q. 25(j),(k), p. 19. OEO's Director stated that, to the contrary, OEO does not issue final determinations. Instead, she explained that such decisions are made by the bureaus in coordination with OEO. She further stated OEO monitors all Title VI decisions of the bureaus; however, no indication was provided as to how such monitoring is conducted. Stith letter, attachment, p. 11.

[124] DOI/NPS Title VI Response, p. 3.

[125] DOI FY 1994 Implementation Plan, FY 1993 Civil Rights Workload and Performance Data, p. 2.

[126] *See* DOI/NPS Title VI Response, p.3. "*Because of the great awareness* of the Americans with Disabilities Act, the number of new complaints are expected to continue to double each year." (emphasis added).

[127] DOI Survey, Q. 74, p. 48.

[128] Fowler interview.

[129] *See* discussion in this chapter, pp. 395–96.

[130] Stith letter, attachment, p. 12.

### Deficiencies, Remedies, and Sanctions

OEO seldom finds recipients in noncompliance, primarily because it conducts few complaint investigations and inadequate or cursory preaward and postaward reviews. Consequently, it seldom obtains remedies or imposes sanctions. DOI has obtained monetary benefits on behalf of some individuals, but never on the basis of a Title VI complaint.[131] OEO has never initiated administrative proceedings against any funding program recipient.[132]

OEO noted a number of deficiencies, including egregious cases of discrimination, it had discovered in its recipients' programs.[133] However, most of these involved very old cases. During the last 5 years, "the department has found deficiencies, but to a limited degree and of a different nature. For example, the National Park Service has found park program participation fee schedules that have discriminated against minorities on the basis of race."[134]

### Community Outreach and Public Education

Outreach, education, and technical assistance are the responsibility of OEO, generally, and of the National Park Service, the Fish and Wildlife Service, and the Bureau of Reclamation for their programs.[135] OEO generally disseminates its Title VI policies through printed posters and pamphlets.[136] OEO staff have developed and distributed a multilingual poster which states that DOI does not discriminate and gives an address for more information. OEO requires that these posters be "prominently displayed" in all facilities receiving funds through OEO.[137] OEO also has produced two brochures for dissemination to grant recipients, applicants, and potential and actual program beneficiaries summarizing the rights and obligations established by Title VI. One was published in 1975; the other is undated; however, its information is also provided in Spanish.[138] OEO's Director stated that information on DOI's nondiscrimination policies is disseminated nationally and also described by recipients in materials distributed explaining program availability.[139] However, no examples of such material were provided to the Commission for consideration or evaluation.

Although at one time OEO had an aggressive community outreach program, DOI currently performs almost no community outreach.[140] This lack of outreach may explain the low number of Title VI complaints received by the Department. If the general public and affected communities are unaware of their Title VI rights and obligations, they will not file claims of violation of Title VI.

The Fish and Wildlife Service reported that its Title VI outreach and education effort has included the development of public service "spots" on Title VI in foreign languages, an awards recognition program for individuals who have made significant contributions to Title VI, as well as various other activities.[141] The Bureau of Reclamation indicated that it had distributed DOI's multilingual posters to recipients of its small loan program and rehabilitation and betterment program.[142] The National Park Service indicated that its regional offices and grants offices and the equal opportunity program provide outreach and education. However, the National Park Service did not make a distinction between outreach and education and technical assistance.[143] Thus, the extent to which the National Park Service conducts outreach and education activities is unclear.

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[131] DOI Survey, Q. 7, p. 50.

[132] Ibid., Q. 79, p. 51.

[133] Ibid., Q. 67, p. 43.

[134] Fowler letter, p. 6.

[135] DOI Survey, Q. 25(g),(h), p. 18.

[136] Ibid., Q. 48, p. 35. *See also* DOI Supporting Documentation, John T. Jones, Director, Office for Equal Opportunity, U.S. Department of the Interior, letter concerning posting of equal opportunity poster, Oct. 17, 1990.

[137] Fowler interview.

[138] DOI Supporting Documentation.

[139] Stith letter, attachment, p. 11.

[140] Fowler interview.

### Technical Assistance

OEO provides technical assistance to the National Park Service, the Fish and Wildlife Service, and the Bureau of Reclamation on a regular basis.[144] OEO generally provides technical assistance to State and local agency staff upon request and during the course of complaint investigations and compliance reviews.[145] However, OEO did not provide the Commission with enough information to assess the extent and quality of the technical assistance provided.

## Oversight of Continuing State Programs

Like those of other Federal agencies, DOI's Title VI regulations require that continuing State program recipients provide statements and methods of administration that reasonably assure their compliance with Title VI.[146]

DOI's guidelines for the land and water conservation fund detail States' Title VI responsibilities. They specify that States, as primary recipients of assistance under the program, are responsible for "giv[ing] a reasonable assurance that the applicant and all subrecipients will comply with the requirements imposed by Title VI, including methods of administration which give reasonable assurance that any noncompliance will be corrected."[147] States must:

- establish an open project selection process
- provide the State civil rights agency the opportunity to comment on applications
- notify OEO of any inconsistencies with Title VI found during onsite facility reviews (assuming that these cannot be corrected at the State level)
- cooperate with OEO toward seeking resolution of inconsistencies
- provide copies of the guidelines to applicants and subrecipients.[148]

Despite these requirements, DOI does not ensure that its continuing State programs are in compliance with its requirements. It does not actively monitor States' compliance programs. Furthermore, none of DOI's other Title VI guidelines give State recipients Title VI responsibilities. OEO's Director stated merely that in continuing State programs, such as the land and water conservation program, in which Title VI enforcement responsibility is delegated to State offices to ensure subrecipient compliance, State enforcement actions are "reviewed periodically for sufficiency by the bureau or office extending Federal aid to the State."[149] She further stated that "continuous Title VI compliance programs are in place at the State level" for programs in which Federal assistance is distributed to State and local governments and such recipients are required by DOI to establish compliance review programs of their subrecipients. She explained that "[a]ll State actions in this regard are monitored on an ongoing basis for sufficiency by the bureau or office extending the Federal aid to the State."[150]

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[141] DOI/FWS Title VI Response, pp. 3–4.

[142] DOI/WBR Title VI Response, p. 1. The Bureau of reclamation also stated that it "responds to occasional inquiries from recipients" for regulatory clarification and interpretation. Ibid.

[143] DOI/NPS Title VI Response, p. 2. The National Park Service stated that it has offered "numerous workshops over the years on various civil rights requirements." Ibid.

[144] DOI FY 1994 Implementation Plan, p. 7

[145] DOI Survey, Q. 53, p. 37. *See also* DOI/NPS Title VI Response, p. 2; DOI/WBR Title VI Response, p.1. The National Park Service stated that it provides assistance during State program reviews, site inspections, complaint investigations, and yearly workshops for recipients. The Bureau of Reclamation indicated that there had been a number of instances in which assistance was provided to managers and recipients in response to inquiries.

[146] 43 C.F.R. § 17.4(b)(1) (1993).

[147] U.S. Department of the Interior, Land and Water Conservation Fund (LWCF) Grants Manual (Title VI Guidelines), Chapter 650.9 (no date), p. 3. These guidelines provide DOI's compliance requirements of Title VI.

[148] Ibid.

## Staff Training

Since program staff, rather than civil rights staff, perform DOI's Title VI enforcement activities, staff training is critical for an effective enforcement effort. Generally, OEO, the National Park Service, the Fish and Wildlife Service, and the Bureau of Reclamation conduct some staff training.[151] All new civil rights and equal employment opportunity staff at the Department receive training in civil rights compliance.[152] In addition, employees in OEO and in bureaus with Title VI responsibilities receive annual training.[153] However, OEO provided the Commission with limited information on its staff training program. It provided no indication that it conducts regular and systematic training of its headquarters or bureau staff responsible for Title VI enforcement activities.[154] OEO also provided the Commission with a copy of its training manual for Title VI and section 504 of the Rehabilitation Act of 1973. It contains copies of the Title VI statute and DOI's implementing regulations and brief synopses of DOI's complaint investigations, preaward and postaward compliance review and technical assistance procedures.[155] The training manual does not indicate the date of its publication and dissemination.

The National Park Service indicated that its program staff who perform civil rights reviews attend a 1-week civil rights workshop at least once every 2 years.[156] Furthermore, the Director of the National Park Service's equal opportunity program maintained that "the present grants staff have, from this training and investigative experience, much more knowledge and skill with regard to the Federal assistance program than do EO Specialists."[157] However, a periodic 1-week training workshop is not sufficient training to develop a thorough understanding of Title VI and its enforcement.[158]

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[149] Stith letter, attachment, p. 10.

[150] Ibid., p. 11–12. The National Park Service stated that its grants staff and State recipient staff accomplish a basic civil rights review during regular program reviews once every 2 years and during preaward reviews. DOI/NPS Title VI Response, p. 2.

[151] DOI Survey, Q. 25(i), p. 19.

[152] Ibid., Q. 49, p. 36.

[153] Ibid., Q. 50, p. 36.

[154] OEO provided miscellaneous memoranda concerning intermittent training sessions, including an outline of scheduled activities for a two-day session in March 1993 entitled, "Federal Assistance Civil Rights Compliance Process"; an "accomplishment report" for July 1990 through June 1991 listing two instances of inhouse bureau level civil rights training, a civil rights training "module" for staff and recipients on conducting compliance reviews, two civil rights workshops for all bureaus, and "hands-on" assistance to staff in the Fish and Wildlife Service; a memorandum concerning a civil rights workshop on September 22, 1993; and a memorandum regarding February 17, 1989 civil rights training. *See* DOI Supporting Documentation. Some of this information referenced Title VI; however, it did not provide information concerning the comprehensiveness of the training or its regularity.

[155] DOI, Office for Equal Opportunity, *Enforcement of Title VI of the Civil Rights Act of 1964 and § 504 of the Rehabilitation Act of 1973*.

[156] DOI/NPS Title VI Response, p. 3.

[157] Ibid.

The importance of maintaining trained civil rights staff becomes even more critical as DOI further decentralizes its civil rights enforcement program. DOI has assigned vital areas of enforcement, such as onsite compliance reviews, to three bureaus' program staff who are not trained in external civil rights enforcement. They perform Title VI functions only as a collateral duty in conjunction with program reviews. Program staff may not have adequate expertise in Title VI enforcement to identify noncompliance when conducting reviews and collecting and analyzing recipient data. This also may impede their ability to provide technical assistance and perform adequate community outreach and public education. DOI provided no indication that any of its or its bureaus' civil rights staff specializes in Title VI enforcement. Therefore, it is likely that no staff members conducting Title VI enforcement activities have comprehensive knowledge of or expertise in Title VI.

## Data Collection and Reporting Requirements and Analysis

OEO's has minimal data collection and reporting requirements of its recipients. Like those of other agencies, OEO's Title VI regulations specify that each recipient should maintain and submit to the Secretary "such records . . . at such times, and in such form and containing such information, as the Secretary or his designee may determine necessary" to determine the recipient's compliance status.[159] However, OEO does not collect and analyze racial and ethnic data,[160] require recipients to develop a system for establishing base data on eligible populations and beneficiaries or participants,[161] or require annual reporting by recipients.[162] During the 1980s, OEO was "barred" from collecting racial data during its compliance reviews, and the issue has not been revisited since then.[163]

Although OEO has failed to require a data collection system of its recipients, the Fish and Wildlife Service reported that it collects data in conjunction with postaward reviews and self-evaluation reports.[164] The service uses the data "to ensure the equitable delivery of recipient benefits and services to the various impacted demographic groups."[165]

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[158] The Bureau of Reclamation indicated that it conducts training on an "as-needed" basis and expects to conduct "broader" training during the next two years. DOI/WBR Title VI Response, p. 1.

[159] 43 C.F.R. § 17.5(b) (1993).

[160] DOI Survey, Q. 25(f), p. 18.

[161] Ibid., Q. 59.

[162] Ibid., Q. 62, p. 40.

[163] Fowler interview, p. 3.

[164] *See* DOI/FWS FY 1994 Civil Rights Implementation Plan, p. 16. The self-evaluation reports appear to be targeted at section 504 of the Rehabilitation Act of 1973, and not at Title VI.

[165] DOI/FWS Title VI Response, p. 8. *See also* DOI/FWS FY 1994 Implementation Plan, p. 19. The Bureau of Reclamation indicated that it "will be expanding" its data collection activities to include Title VI. DOI/WBR Title VI Response, p. 1. It already has instituted a data management system related to enforcement of section 504 of the Rehabilitation Act. U.S. Department of the Interior, Bureau of Reclamation, FY 1994–1997—Disability Rights Implementation Plan, p. 4 (hereafter cited as DOI/WBR Implementation Plan).

## Civil Rights Implementation Plans

The Commission reviewed DOI's Civil Rights Implementation Plans for the years 1990, 1992, 1993, and 1994.[166] The Commission was unable to obtain a copy of DOI's 1991 Civil Rights Implementation Plan. The plans do not provide sufficient information for the Department of Justice to assess or the general public to understand the Department's approach to civil rights enforcement. For instance, the plans do not indicate that program staff, rather than civil rights staff, perform most of the bureaus' Title VI enforcement activities. Furthermore, DOI did not appear to use the plans as a management and planning tool.

Specifically, although DOI's Civil Rights Implementation Plans follow the basic outline provided by the Department of Justice, the section on the Department's goals and objectives does not conform closely to the Department of Justice guidelines.[167] DOI presented long-range goals with respect to federally assisted programs in 1990, and it offered the same long-range goals in the 1992, 1993, and 1994 Civil Rights Implementation Plans. These goals were:

- to ensure that all covered programs and activities of the Department are in absolute compliance with all applicable civil rights requirements,

- to establish decentralized civil rights compliance and enforcement functions throughout all bureaus and offices administering Federal financial assistance programs, and

- to have all federally assisted programs and activities of the Department covered by a continuous program of civil rights compliance reviews.[168]

DOI's Civil Rights Implementation Plans also specified several major objectives. However, the plans did not connect the objectives in any way to the long-range goals. With the exception of the 1994 plan, DOI's plans did not have short-term objectives.[169]

The reorganization of DOI's civil rights enforcement function between 1990 and 1992 may have interrupted progress toward these goals. The progress report sections of the 1992 and 1993 plans do not indicate that DOI made any progress towards achieving the major objectives outlined in the 1990 plan. However, these sections do report on a number of other civil rights enforcement activities undertaken by DOI during the intervening years. The progress report in the 1994 plan indicates progress towards decentralizing DOI's Title VI enforcement activities, but none towards expanding the coverage of its programs or ensuring that a continuous system of compliance reviews covered all federally assisted programs.[170]

In addition to the departmentwide Civil Rights Implementation Plans submitted to the Department of Justice, the Commission reviewed the Fish and Wildlife Service's fiscal year 1994 Civil

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[166] The Commission also reviewed the Fish and Wildlife Service's fiscal year 1994 Civil Rights Implementation Plan. The Fish and Wildlife Service did not submit its plan to the Department of Justice. The National Park Service and the Bureau of Reclamation did not prepare such plans, although they contributed to the preparation of the departmentwide plans. *See* DOI/NPS Title VI Response, p. 3; DOI/WBR Title VI Response, pp. 2, 3. The Bureau of Reclamation submits such a plan for its activities related to section 504 of the Rehabilitation Act. *See* DOI/WBR Implementation Plan.

[167] U.S. Department of Justice, "Guideline for Agency Implementation Plans Required by Executive Order 12250, 'Leadership and Coordination of Nondiscrimination Laws,'" (no date), p. 9.

[168] *See* DOI FY 1994 Implementation Plan, p. 14.

[169] *See* DOI FY 1990 Implementation Plan; DOI FY 1992 Implementation Plan; DOI FY 1993 Implementation Plan; DOI FY 1994 Implementation Plan.

[170] *See* DOI FY 1994 Implementation Plan, pp. 16–18.

Rights Implementation Plan. The plan provides extremely detailed information on the organization of civil rights enforcement at the service,[171] as well as on the service's approach to major civil rights functions.[172] However, the sections of the plan that presented goals and objectives and progress towards meeting them are not as detailed. The goals and objectives were vague and did not contain measures of accomplishment or timeframes for accomplishing them. The plan did not relate its discussion of the service's progress to the stated goals and objectives. Although the Fish and Wildlife Service's plan provides considerable information about the service's Title VI enforcement program, the service did not appear to use the plan as a management tool. OEO's Director explained that DOI's more specific goals, objectives, and activities are addressed in annual workplans prepared by its Federal Assistance Team and Equal Opportunity Offices.[173]

## Findings and Recommendations

### Organization, Budget, Staffing, and Workload

#### Organization—The Office for Equal Opportunity

**Finding:** Title VI implementation, compliance, and enforcement at the U.S. Department of the Interior (DOI) lacks adequate leadership, coordination, oversight, and direction. Title VI civil rights enforcement is neither a priority nor an integral part of DOI's primary mission, goals, or objectives.

**Recommendation:** The Secretary of the Interior must begin immediately to enforce Title VI and other civil rights provisions vigorously at the departmental level and provide leadership and direction to DOI's bureaus to ensure that they establish effective civil rights enforcement programs. The Secretary also must ensure that sufficient funds and staff resources are committed to fulfill DOI's legal obligation to enforce Title VI. The Secretary, through the Deputy Secretary, should take immediate action to evaluate whether the National Performance Review or congressional downsizing mandates may adversely impact on its ability to enforce civil rights in DOI's federally funded programs and activities. The Secretary should continue to seek ways of improving the effectiveness and efficiency of its civil rights staff; however, those efforts should not impede DOI's ability to develop uniform and comprehensive policy concerning Title VI enforcement and proactively to direct and monitor the operational civil rights enforcement activities performed at the bureau level.

**Finding**: The Director of the Office for Equal Opportunity (OEO) is several levels removed from the Secretary of the Interior in DOI's chain of command. Consequently, she is not in a sufficient position within the Department to ensure that civil rights enforcement is as much of a priority at DOI as other departmental responsibilities, such as policy and budget development.[174]

**Recommendation:** DOI should make OEO independent of other offices responsible for implementing projects that are subject to civil rights compliance. OEO should serve as a "watchdog" over these other offices, analogous to the role of the Office of the Inspector General, to ensure that all DOI initiatives, plans, programs, and activities, both external and internal, originating from other offices, such as the Office of Policy, Management, and Budget, comply with the civil rights provisions that OEO must enforce. As part of this rearrangement, OEO's Director should necessarily report directly to the Secretary, as do other office heads, in order to ensure that civil rights enforcement is of equal priority at DOI as other agency responsibilities.

**Finding:** OEO's role involves developing policy for and providing guidance and direction to DOI's bureaus.[175] However, OEO does not have a separate unit for policy development.[176] Furthermore, it does not have independent legal staff. In order to develop the regulations, guidelines, policies, and procedures critical to its Title VI enforcement program, OEO must rely upon the assistance of DOI's Office of the Solicitor. If the Office of the Solicitor has other priorities, OEO may face delays in making necessary legal modifications and improvements to its Title VI enforcement structure.[177]

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[171] DOI/FWS FY 1994 Implementation Plan, pp. 3–4.

[172] Ibid., pp. 4–20.

[173] Stith letter, attachment, p. 12.

[174] *See* p. 387.

**Recommendation:** OEO should have a separate unit for policy development and programmatic guidance. The unit should oversee all aspects of DOI's policy development and dissemination for civil rights enforcement. Also, it should provide policy, programmatic, and legal guidance and support to DOI's bureaus and to other OEO staff members. DOI should provide the unit with the authority and responsibility for modifying and maintaining DOI's Title VI regulations, guidelines, policies, and procedures. DOI should assign necessary legal staff to this unit to perform the legal work, including regulatory and other legal interpretation and guidance, crucial to comprehensive, efficient, and successful external civil rights enforcement.

**Finding**: OEO has decentralized its external civil rights enforcement program so that DOI's bureaus now perform all civil rights enforcement procedures. OEO remains responsible for overseeing and monitoring the bureaus' enforcement efforts, in addition to providing them with policy guidance.[178] The Commission commends DOI's efforts to effectuate a more efficient Title VI enforcement program. However, in order to ensure uniform and comprehensive Title VI enforcement, OEO must assume an active role in overseeing, coordinating, and monitoring bureau staff. OEO provided no indication that it has instituted a regular or comprehensive system of oversight, coordination, and review of the bureaus. It does not have a unit devoted specifically to those functions.[179] It does not coordinate data collection and analysis among the bureaus, nor does it assist DOI bureaus with overall planning in civil rights enforcement. In addition, OEO provided no indication that it regularly and thoroughly trains bureau staff responsible for Title VI enforcement.

**Recommendation**: Since OEO remains ultimately responsible for ensuring external civil rights enforcement in DOI's federally assisted programs, it must implement a systematic oversight and monitoring program of Title VI enforcement work being performed in DOI's bureaus. It should create a unit devoted to that function. That unit should be responsible for the operational planning and overall development of fiscal year goals and objectives for DOI's civil rights enforcement efforts. The unit must regularly and thoroughly evaluate the work performed by bureau staff to ensure that Title VI implementation and enforcement procedures are being adequately executed. It must assess the efficiency and effectiveness of the bureaus at meeting the goals and objectives. It should function as the central data bank for DOI's information on recipient compliance with Title VI, and it should maintain an information system that collects data from the bureaus. The unit also must ensure that the bureau staff performing enforcement and compliance procedures are thoroughly trained. This requires either regular training by OEO or training by the bureaus that OEO should oversee.

**Finding**: DOI's federally assisted program civil rights enforcement program is currently being reviewed in a "reinvention laboratory," as part of the National Performance Review. The Commission commends any efforts by DOI to make its external civil rights enforcement program more efficient. However, OEO must continue to ensure uniform and comprehensive enforcement pending the results and recommendations of the review and pending the proved success of any ensuing efficiency measures.[180]

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[175] *See* note 29.

[176] *See* p. 387.

[177] *See* p. 388.

[178] *See* note 29.

[179] *See* p. 388.

**Recommendation:** In considering how to improve its civil rights enforcement program, DOI should not limit its focus only to issues of streamlining. DOI should also consider whether it needs to devote additional resources to its civil rights enforcement effort. DOI should conduct a thorough assessment of its civil rights workload and responsibilities and the necessary resources for fulfilling these responsibilities, particularly those responsibilities associated with Title VI enforcement. In addition, until measures aimed at making civil rights enforcement at DOI more efficient are proved successful, OEO should be actively directing, monitoring, and ensuring Title VI enforcement.

### Organization—DOI Bureaus

**Finding:** OEO has delegated Title VI enforcement responsibilities to three of DOI's bureaus, the National Park Service, the Fish and Wildlife Service, and the Bureau of Reclamation. For DOI's other bureaus, OEO has not delegated similar responsibilities and it also does not conduct Title VI enforcement activities on their behalf. Thus, effectively, the programs of DOI's other bureaus are not subject to OEO's Title VI enforcement program. As a result, OEO cannot ensure that these programs are operated in compliance with Title VI.

OEO's reasons for not having Title VI programs for these bureaus are unclear and unconvincing. The position that Title VI does not apply to all of its federally assisted programs because some of them do not have readily identifiable beneficiaries is misguided. Whether OEO's programs have identifiable intended beneficiaries is immaterial to whether they are subject to the nondiscrimination requirement of Title VI. Since OEO's programs potentially have adverse or beneficial impacts on protected groups, even if those affected are not intended beneficiaries of the programs, the programs need to be operated in compliance with Title VI. Similarly, OEO's contention that the federally assisted programs of its other bureaus are not subject to Title VI because they are not designated for specific purposes also is erroneous. OEO's final reason for not ensuring Title VI enforcement in the federally assistance programs of these bureaus is that their recipients also receive funding from other bureaus or other Federal agencies, the Title VI enforcement responsibility for which has been delegated to the Department of Education or one of DOI's three lead bureaus. However, OEO remains ultimately responsible for ensuring that to the extent DOI distributes Federal funds, those funds are utilized in a nondiscriminatory fashion and comply with the requirement of Title VI. Therefore, it is inadequate for OEO to abdicate totally its responsibility related to such programs.[181]

**Recommendation:** OEO should implement active Title VI enforcement programs for each of DOI's bureaus that administer Federal financial assistance. To the extent feasible, OEO should delegate Title VI responsibilities to the other bureaus in a manner similar to its current agreements with the National Park Service, the Fish and Wildlife Service, and the Bureau of Reclamation. However, as OEO delegates Title VI enforcement responsibilities to these bureaus, it should ensure that it has sufficient staff and other resources to provide effective Title VI coordination and oversight for these additional bureaus. Similarly, if Title VI enforcement responsibility for a bureau's programs has been delegated to another bureau or to the Department of Education, OEO should ensure that the bureau, nevertheless, monitors Title VI enforcement for the federally assisted programs and activities it is responsible for operating.

**Finding:** In the three bureaus that have been delegated Title VI enforcement responsibilities as part of OEO's decentralization, daily Title VI enforcement activities are performed by program administration staff operating out of the bureaus' grant-making offices, rather than staff assigned solely to external civil rights enforcement. The Commission commends OEO's efforts to make its civil rights enforcement effort more efficient through decentralization. However, in order to ensure uniform and successful Title VI enforcement, these program management staff must be regularly and comprehensively trained in Title VI implementation and enforcement, particularly in conducting key activities, such as preaward and postaward compliance reviews, technical assistance to DOI recipients, public outreach and community education, complaint investigations, and compliance agreements. In addition, because these program administration staff conduct their Title VI compliance activities as a collateral duty to regular program activities, they are unlikely to devote adequate time to Title VI enforcement. OEO must develop a plan for ensuring that staff do not place the responsibility of meeting program objectives above enforcing civil rights in those same programs.[182]

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[180] *See* p. 389.

[181] *See* pp. 389–90.

**Recommendation:** OEO should not rely exclusively on program management personnel to conduct operational Title VI enforcement activities. Each of the bureaus should have fully trained external civil rights enforcement specialists assigned to conducting such activities and ensuring Title VI enforcement in the programs administered by the program personnel. The bureaus' civil rights personnel should take primary responsibility for conducting complaint investigations and compliance reviews of recipients, as well as providing technical assistance and public outreach and education. The program personnel should assist in these efforts by incorporating civil rights issues into their regular program review, technical assistance, and public outreach and education activities. To the extent that program management staff participate in Title VI enforcement, OEO must ensure that they are adequately trained in external civil rights enforcement activities.

### Budget, Staffing, and Workload

**Finding:** OEO has not instituted a mechanism for managing resources devoted specifically to Title VI enforcement. Not only does it not allocate a part of its budget for activities associated with external civil rights, and particularly Title VI, enforcement in its federally assisted programs and activities, it also does not maintain records of its Title VI expenditures. Hence, OEO cannot determine whether the resources it devotes to Title VI activities are increasing or decreasing relative to the resources it devotes to its other responsibilities. This impedes OEO's ability to engage in systematic planning for its Title VI enforcement program.[183]

**Recommendation:** OEO should develop an information management system that enables it to track its Title VI expenditures separately from its expenditures on other civil rights activities. This system should include data on expenditures of the bureaus as well as OEO's. This system should be used by OEO's program planning staff in their management planning activities. For instance, the information should be used in the development of annual civil rights enforcement plans. The information system should help guide OEO's resource allocation among civil rights enforcement activities. Furthermore, OEO should use this information to demonstrate the significance of increased or decreased resources on Title VI enforcement.

**Finding:** OEO has only five external civil rights staff. Three of these staff have been detailed to the Fish and Wildlife Service; and one has been assigned to the National Park Service. Only one remains located in OEO. Other than these five external civil rights staff, both OEO and the bureaus have only program administration and internal civil rights staff to execute Title VI enforcement procedures. Two external civil rights staff members in OEO are clearly inadequate for ensuring that the federally assisted programs operated by DOI's nine bureaus are all operated in compliance with Title VI. Similarly, the five external civil rights staff located in the two bureaus are inadequate to ensure comprehensive Title VI enforcement.[184]

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[182] *See* pp. 389–90.

[183] *See* p. 391.

**Recommendation:** To the extent that OEO must assign external civil rights enforcement responsibilities to program administration and other staff, it must ensure that such staff are regularly and comprehensively trained in Title VI enforcement procedures. In the bureaus, not only must such staff be trained, but they also must be monitored and guided by external civil rights enforcement staff in OEO.

## Regulations, Guidelines, Policies, and Procedures

### Regulations

**Finding:** DOI has not revised or modified the Department of Education's model regulations to ensure their application to DOI's federally assisted programs. In particular, the regulations retain numerous education-related examples that are irrelevant to DOI's federally assisted programs and activities and do not include examples that are specific to DOI programs and activities. In addition, DOI's regulations are outdated. They do not incorporate clarifications to Title VI's coverage and fund termination provisions made by the Civil Rights Restoration Act of 1987. They also do not include an updated appendix listing all of DOI's federally assisted programs and, therefore, do not specify thoroughly all of the DOI programs covered by Title VI.[185]

**Recommendation:** DOI should revise and update its Title VI regulations to delete education-related examples that are not relevant to DOI programs, to incorporate examples illustrating Title VI's application to DOI's federally assisted programs and activities, and to reflect the clarifications made by the Civil Rights Restoration Act of 1987. In addition, DOI should publish annually a revised list of its federally assisted programs in the *Federal Register*.

### Guidelines

**Finding:** For most of DOI's federally assisted programs, DOI has never prepared Title VI guidelines, as required by the U.S. Department of Justice. Furthermore, for those programs where DOI has issued Title VI guidelines, the guidelines are outdated. For instance the guidelines for the National Park Service programs do not reflect DOI's current decentralized Title VI enforcement structure. Therefore, the guidelines do not provide the necessary guidance to recipients on DOI's current Title VI enforcement policies and practices.[186]

**Recommendation:** DOI should immediately update its existing Title VI guidelines to reflect the current structure and process of Title VI enforcement at the agency. DOI should also issue guidelines for each of its other federally assisted programs. Specifically, the guidelines should outline the relative responsibilities of OEO, the bureaus' civil rights offices, the bureaus' program offices, and recipients for ensuring Title VI compliance in the areas of preaward and postaward compliance reviews; complaints processing; data collection, reporting, and analysis; technical assistance; and outreach and education. The guidelines should include a description of the specific types of data recipients must collect and report to OEO. In addition, the guidelines should also indicate clearly what actions constitute a violation of Title VI, with specific examples related to the DOI program covered by the guidelines. For continuing State programs, DOI's guidelines should delineate clearly the States' Title VI compliance responsibilities. In particular, they should require States to submit methods of administration for DOI approval, as well as provide DOI with Title VI self-assessments and compliance plans on a regular basis.

### Policies

**Finding:** OEO has not fulfilled its mandate to provide leadership and coordination on Title VI to DOI's bureaus by issuing regular policy guidance interpreting Title VI and analyzing emerging issues affecting Title VI enforcement. For instance, DOI has not issued policy directives concerning several critical areas of Title VI enforcement, including the implications of the Civil Rights Restoration Act of 1987 and the extent to which Title VI prohibits employment discrimination in the administration of DOI's federally assisted programs.[187]

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[184] *See* p. 391.

[185] *See* pp. 392–93.

[186] *See* p. 393.

**Recommendation:**: OEO should provide frequent policy guidance on Title VI and other civil rights statutes to clarify their meaning and implications for DOI's bureaus, DOI recipients, intended beneficiaries of DOI programs, and the general public. For instance, OEO should issue policy guidance explaining the implications of the Civil Rights Restoration Act for DOI's Title VI enforcement. OEO should also issue guidance clarifying that all of DOI's federally funded programs are subject to the nondiscrimination requirements of Title VI, including programs that do not have clearly identifiable intended beneficiaries, block grants, and other State-administered programs that provide funds generally without designating particular programs or activities.

### Procedures

**Finding:** DOI's Title VI enforcement procedures, published in a Department manual, are outdated. They do not reflect DOI's current Title VI enforcement structure, especially its current decentralized Title VI enforcement structure.[188]

**Recommendation:** OEO should proceed immediately to develop a Title VI enforcement manual that details the OEO's current Title VI enforcement procedures. The manual should provide detailed information on the responsibilities of OEO, the bureaus' civil rights and program staff, including thorough explanations of every implementation and enforcement procedure, such as collecting assurances of nondiscrimination; conducting preaward and postaward compliance reviews; processing and investigating complaints; performing community outreach, public education, and technical assistance; and negotiating and monitoring compliance agreements. The procedures manual should not only provide detailed step-by-step instructions for conducting civil rights reviews and investigations, it should also detail the types of information staff should consider during such the reviews and investigations and provide examples of the persons and sources staff should contact for information, such as program participants, intended beneficiaries, and interested community groups. It should also outline the analyses that staff should conduct to ensure compliance with Title VI.

## Process of Title VI Enforcement

### OEO Oversight of the Bureaus

**Finding:** Because OEO has decentralized its civil rights enforcement structure and delegated the operational responsibility for Title VI enforcement to staff in DOI's bureaus, it must institute a comprehensive and regular oversight and monitoring system. Otherwise, it cannot ensure that the federally assisted programs operated by DOI bureaus are in compliance with the nondiscrimination requirement of Title VI. Currently, OEO's oversight of the three bureaus that have been delegated Title VI enforcement responsibilities is neither comprehensive or sufficiently frequent. To the contrary, OEO's monitoring of the bureaus' enforcement programs is limited to a paper review of self-assessment reports and letters of finding submitted to OEO by the bureaus. OEO does not conduct onsite reviews of the bureaus' Title VI enforcement programs, nor does it review the bureaus' compliance review files to assess the quality of the bureaus' reviews. Furthermore, OEO does not have sufficient contact with the bureaus, their program offices, and their recipients to determine the type of technical assistance or training that may be necessary to improve their Title VI enforcement efforts.[189]

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[187] *See* p. 393.

[188] *See* pp. 394–95.

[189] *See* pp. 395–96.

**Recommendation:** OEO should develop a system for oversight and monitoring of the DOI bureaus' Title VI enforcement activities, including, but not limited to, periodic onsite reviews of the bureaus' Title VI enforcement programs. During its onsite reviews, OEO should review the bureaus' complaint files and compliance review files, evaluate the bureaus' data collection, interview program staff and recipients, and issue a report with findings and recommendations for improvement. In addition to periodic reviews of the bureaus' Title VI compliance and enforcement programs, OEO should conduct annual reviews of Title VI self-assessments provided by the bureaus and provide the bureaus with regular staff training and technical assistance on Title VI.

### Preaward Reviews

**Finding:** OEO does not appear to have a uniform policy requiring preaward reviews of all applicants before Federal funding is approved. Of DOI's nine bureaus, only the National Park Service and the Fish and Wildlife Service conduct preaward reviews. Furthermore, the information OEO submitted to the Commission suggests that most of DOI's preaward reviews are perfunctory reviews based on a Title VI checklist, rather than comprehensive assessments of compliance with Title VI.[190]

**Recommendation:** OEO should ensure that each of its major federally assisted programs incorporates preaward Title VI reviews as an integral part of the compliance process. These preaward reviews should consist of more than a cursory check that the applicant has submitted a Title VI assurance. They should be conducted in sufficient depth to allow OEO to make a determination, before bureaus release Federal funds, that applicants are in compliance with Title VI and with DOI's Title VI regulations. Accordingly, preaward reviews should include an analysis of program data and other information supplied by the applicants. Staff should consider in its preaward reviews whether the applicant provides equal access to its programs to all protected groups. For large projects, such as new parks or large construction projects, OEO should assess whether they have an adverse impact on any racial or ethnic minority group.

### Postaward Reviews

**Finding:** OEO conducts no postaward desk-audit reviews of recipients. The failure of OEO and DOI bureaus to utilize postaward desk-audit reviews as a means of determining recipients' compliance status indicates a misuse of resources, since such reviews enable funding agencies to examine more recipients with fewer staff and resources than onsite investigations.[191]

**Recommendation:** OEO should develop and implement procedures for integrating postaward desk-audit reviews into its civil rights enforcement process. As part of this effort, OEO should ensure that it collects, on a regular basis, sufficient information from its recipients to conduct meaningful desk-audit reviews of their federally funded programs. Such information includes data on program participants and the eligible population by race, color, and national origin, as well as data on the ethnic composition of communities affected by the recipient's programs. Desk-audit reviews should be used both as a means of detecting potential Title VI violations and to assist OEO in selecting recipients needing more comprehensive onsite investigations.

#### Onsite Compliance Reviews

**Finding:** Although DOI's bureaus conduct onsite compliance reviews, those reviews do not constitute the comprehensive civil rights compliance investigations contemplated by the Department of Justice. Because they are generally conducted by program management staff during the course of routine program inspections, DOI's compliance reviews have several critical deficiencies:

- They are not conducted by civil rights staff who understand the requirements of Title VI and who have experience uncovering illegal discrimination.

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[190] *See* pp. 396–97.

[191] *See* pp. 397–98.

- They are limited in scope to the types and amount of information that can be discovered easily during the course of a project inspection, essentially information indicated on a civil rights checklist.
- They review only the project within a system that received Federal funds, rather than reviewing the entire system, as required by Title VI under the Civil Rights Restoration Act.[192]

**Recommendation:** Although OEO and DOI's bureaus should continue to monitor civil rights compliance during the course of its project reviews, they also should develop and implement procedures specific to conducting comprehensive Title VI and other external civil rights compliance reviews of funding recipients. Such reviews should include a broad investigation of the recipients' programs and practices, including those that are not funded directly by DOI. The reviews should include extensive interviews with recipients' staff, program participants, affected parties, and interested community groups, as well as a thorough analysis of data collected by the recipients. The reviews should be conducted by trained civil rights personnel from DOI's bureaus or from OEO, not by collateral-duty program staff who receive limited training in general civil rights issues.

### Outreach and Education

**Finding:** OEO's community outreach and public education efforts related to Title VI are limited. OEO has developed and distributed a multilingual civil rights poster and several civil rights brochures. However, OEO does not engage in any other meaningful outreach and education effort. DOI's bureaus also conduct little Title VI outreach and education. Of the three bureaus with active Title VI enforcement programs, only one, the Fish and Wildlife Service, does anything more than display DOI's civil rights poster. An indication that DOI's Title VI outreach and education efforts are insufficient is that DOI receives few Title VI complaints.[193]

**Recommendation:** OEO should take the lead in developing a comprehensive Title VI community outreach and public education program for DOI. To do this, OEO should develop specific plans and strategies for ensuring that members of the public are informed of the rights afforded them by Title VI. In addition, each of the DOI bureaus administering federally funded programs and responsible for Title VI enforcement activities should take proactive steps to inform recipients, intended beneficiaries, and affected groups on how Title VI applies to their programs. Such steps should be more extensive than displaying DOI's equal opportunity poster and distributing civil rights brochures. For example, DOI bureaus should make regular contacts with groups affected by their programs to ensure that they are aware that programs are covered by Title VI, of what constitutes a violation of Title VI, and of how to file a Title VI complaint.

### Complaint Investigations

**Finding:** OEO's Title VI complaint investigations generally do not detect discrimination. Thus, OEO's complaint investigations may not sufficiently comprehensive to discover violations of Title VI.[194]

**Recommendation:** OEO and DOI's bureaus should develop and implement complaint investigation procedures and a quality assurance review process that ensure that all complaints of discrimination are thoroughly investigated before a final agency decision is issued to the complainant and recipient.

### Technical Assistance

**Finding:** As part of its mandate to provide coordination and oversight of the Title VI enforcement programs of DOI's bureaus, OEO is charged with providing technical assistance to the bureaus. However, the extent of OEO's technical assistance activity is limited by the size of its external civil rights enforcement staff.[195]

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[192] *See* pp. 398–99.

[193] *See* pp. 400–01.

[194] *See* p. 399.

**Recommendation:** OEO should develop a regular and systematic technical assistance program for staff in the bureaus assigned to perform Title VI enforcement procedures. To accommodate its limited resources, OEO should provide such assistance during the course of its regular onsite monitoring reviews of bureaus' programs. OEO should also provide technical assistance on complicated or emerging issues to all recipients on a periodic basis, through telephone contacts, written communications, civil rights conferences, and other appropriate forums. In addition, OEO should delegate the responsibility for providing technical assistance to funding recipients to the bureaus. In order to ensure that such assistance is adequate, staff in the bureaus must be trained in external civil rights enforcement and must be monitored by OEO to ensure proper performance of their technical assistance and other enforcement duties.

## Oversight of Continuing State Programs

**Finding:** DOI's Title VI regulations require that State recipients provide methods of administration showing how they intend to ensure compliance with Title VI and DOI's Title VI regulations. DOI's guidelines for the land and water conservation fund include more detailed requirements of States. Aside from the guidelines for this program, DOI's guidelines do not give State recipients Title VI responsibilities. OEO does not actively monitor States' compliance with Title VI. Therefore, it cannot ensure that its continuing State programs are in compliance with DOI's requirements. Since DOI distributes most of its funding through continuing State programs, DOI's failure to ensure that the States are in compliance with Title VI is critical.[196]

**Recommendation:** OEO and DOI's bureaus should require that States operating continuing State programs funded by DOI submit methods of administration for review and approval. Furthermore, OEO should ensure that States submit annual Title VI self-assessments reporting on their compliance with Title VI. The methods of administration and the Title VI self-assessments should be reviewed by civil rights specialists in the bureaus. The oversight and monitoring functions performed by those staff should, in turn, be monitored and evaluated by OEO. In addition, the bureaus' civil rights staff should conduct periodic onsite reviews of continuing State programs to ensure that they are in compliance with Title VI. They should provide technical assistance during the course of these reviews, and provide to the States a report assessing their Title VI compliance status and recommending improvements to their Title VI compliance programs.

## Staff Training

**Finding:** OEO provides no regular or comprehensive training to its staff, particularly to bureaus' program administration staff who are assigned Title VI enforcement responsibilities. Thus, OEO's Title VI enforcement activities are generally performed by poorly trained staff at the expense of the quality of its Title VI enforcement program.[197]

**Recommendation:** DOI should allocate the necessary budget resources and undertake steps to ensure that all of its staff receive adequate training on Title VI law; implementation and enforcement procedures, such as conducting Title VI compliance reviews and complaint investigations; and types of discrimination proscribed by Title VI. OEO should provide all civil rights staff with comprehensive civil rights training and regular update training. Furthermore, OEO should ensure that bureaus' program staff with Title VI enforcement responsibilities possess a thorough foundation in Title VI compliance and enforcement, with annual training thereafter.

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[195] *See* p. 401.

[196] *See* pp. 401–02.

[197] *See* pp. 402–03.

## Data Collection, Reporting, and Analysis

**Finding:** OEO and DOI's bureaus do not actively or regularly collect and analyze data from funding recipients. OEO does not require its recipients to collect or report any specific types of data to the Department. Therefore, OEO has totally abandoned this crucial Title VI enforcement function. As a result, it cannot use several proactive Title VI enforcement mechanisms, including desk-audit preaward and postaward reviews. Furthermore, it cannot conduct meaningful analyses of its federally funded programs to ensure that its funds are distributed without regard to race, color, or national origin or to ascertain areas where potential Title VI problems exist. The Fish and Wildlife Service is an exception because it collects and analyzes data from its recipients through postaward reviews and self-assessment reports.[198]

**Recommendation:** Bureau staff with Title VI enforcement responsibilities should regularly collect and analyze data from recipients as part of a proactive Title VI enforcement effort. That information should be reviewed by OEO as part of its monitoring of bureau enforcement performance. OEO should include in the Title VI guidelines for each of its programs detailed data collection and reporting requirements of its recipients. Each recipient should be required to collect data on eligible populations and applicants to and participants in its programs by race, color, or national origin. Where appropriate, such as in continuing State programs or programs involving large projects, OEO should require more extensive reporting from its recipients, such as Title VI self-assessment reports. These self-assessments should include an analysis of the demographic composition of the communities affected by the projects and programs. OEO should develop a uniform data system to allow it to collect and analyze recipients' data.

## Civil Rights Implementation Plans

**Finding:** OEO's Civil Rights Implementation Plans do not fulfill the objectives specified by the Department of Justice in its "Guideline for Agency Implementation Plans Required by Executive Order 12,250, 'Leadership and Coordination of Nondiscrimination Laws.'" They do not provide sufficient information for the Department of Justice to assess the quality of DOI's Title VI enforcement or for the general public to gain an understanding of the program. Furthermore, the plans show no indication of being used as a management tool by OEO. For example, the goals and objectives section of the plans do not follow the format prescribed in the Department of Justice's guideline, which requires that the goals and objectives be specific and that they include timetables and standards for accomplishment.[199]

**Recommendation:** OEO should develop its Civil Rights Implementation Plans in accordance with the Department of Justice's "Guideline for Agency Implementation Plans Required by Executive Order 12250, 'Leadership and Coordination of Nondiscrimination Laws.'" The plans should be made available to the public and describe thoroughly DOI's Title VI enforcement program. They should include a discussion of OEO's methods for selecting recipients for compliance reviews, specific milestones for conducting reviews, procedures for handling complaints, and strategies for all compliance activities, such as outreach and education, training, and technical assistance. They should describe DOI's Title VI quality assurance programs. OEO should use its plans as a management tool, as the Department of Justice intended. Thus, the plans should include specific long-range and short-term goals and objectives, with measures of accomplishment and timeframes for their achievement. The goals and objectives, as well as the projected timeframes, should be developed based on an analysis of available staff and budgetary resources, and specific resources should be designated for their accomplishment.

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[198] *See* pp. 403–04.

[199] *See* pp. 404–05.

## Chapter 11

# The U.S. Environmental Protection Agency

The U.S. Environmental Protection Agency (EPA) provides roughly $4.3 billion of Federal financial assistance under 44 different programs to approximately 1,500 recipients.[1]

## EPA's Federally Assisted Programs

A number of offices at EPA have responsibility for administering Federal financial assistance programs: the Office of Air and Radiation; the Office of Water; the Office of Research and Development; the Office of Administration; the Office of Pollution Prevention and Toxics; the Office of Solid Waste and Emergency Response (OSWER); the Office of Prevention, Pesticides, and Toxic Substances; the Office of Information Resources Management; and the Office of Environmental Education.

EPA's federally assisted programs include:

- The *air pollution control support program*, operated by the Office of Air and Radiation, provides formula grants to help State and local government agencies implement effective air pollution control programs.[2]

- The *State revolving fund*, administered by the Office of Water, provides capitalization grants, in the form of formula grants, to help transition States to State and local financing of municipal wastewater treatment facilities.[3]

- The Office of Pollution Prevention and Toxics provides *asbestos hazards abatement assistance*, in the form of grants and loans, to local education agencies for the removal of asbestos in schools.[4]

- The *hazardous substance response trust fund*, known as the Superfund, administered by OSWER, provides assistance, in the form of project grants, to States to identify and clean up hazardous waste sites.[5]

- OSWER also gives *Superfund technical assistance grants* to community groups to hire technical advisors who assist with the technical aspect of assessing the potential risks of hazardous waste sites.[6]

- The *pollution prevention grants program*, operated by the Office of Prevention, Pesticides, and Toxic Substances, supports State and local pollution prevention efforts.[7]

- The *State-EPA data management financial assistance program*, operated by the Office of

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[1] U.S. Environmental Protection Agency, "Fiscal Year 1994 Civil Rights Implementation Plan," p. 10 (hereafter cited as EPA FY 1994 Implementation Plan).

[2] Office of Management and Budget and U.S. General Services Administration, *1993 Catalog of Federal Domestic Assistance* (Superintendent of Documents: Washington, D.C., 1993), p. 660 (hereafter cited as *Catalog of Federal Domestic Assistance*).

[3] Ibid., pp. 673–74.

[4] Ibid., p. 692.

[5] Ibid., p. 696.

[6] Ibid., p. 698.

[7] Ibid., p. 704.

Information Resources Management, provides funding to States to improve the management and use of environmental data by government.[8]

## Environmental Justice

Over the last 10 years, the concern that residents of predominantly minority and low-income communities bear a disproportionate share of environmentally related health risks has prompted increasing calls for "environmental justice."[9] To address environmental justice issues, EPA created an Office of Environmental Justice (OEJ), charged with coordinating all of EPA's environmental justice efforts.[10] Furthermore, EPA has begun to collect data necessary to determine whether some population groups are disproportionately exposed to health risks. EPA also is actively engaged in outreach and education to low-income communities and minority communities on environmental justice issues.[11]

Other EPA offices also have begun environmental justice initiatives.[12] The Office of Solid Waste and Emergency Response (OSWER), convened an Environmental Justice Task Force, which recently issued a draft report asking EPA to achieve environmental protection for the general public and to educate and empower communities particularly affected by environmentally related health hazards.[13] The Office of Research and Development has begun a major survey program entitled the National Human Exposure Assessment Survey. Other EPA offices are using census population data to determine the income and racial characteristics of persons residing near environmental hazard sites, and several offices have begun to improve their methodologies for measuring health risks.[14]

### Executive Order 12,898

On February 11, 1994, President Clinton issued Executive Order 12,898, entitled "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations."[15] Using language similar to that in Title VI, Executive Order 12,898 states the following:

> Each Federal agency shall conduct its programs, policies, and activities that substantially affect human health or the environment, in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons

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[8] Ibid., p. 706.

[9] *See* James H. Colópy, *The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 Stanford Envtl. L.J. 125, 126–29 (1994).

[10] Clarice E. Gaylord, Director, Office of Environmental Equity, U.S. Environmental Protection Agency, letter to Bobby D. Doctor, Acting Staff Director, U.S. Commission on Civil Rights, Apr. 13, 1993, attachment, "Responses by the Environmental Protection Agency to Questions by the United States Commission on Civil Rights on Environmental Equity and Civil Rights Enforcement," Q. 1, p. 2 (hereafter cited as Gaylord letter, attachments).

[11] Ibid., pp. 6–7.

[12] Ibid., pp. 3–4.

[13] Office of Solid Waste and Emergency Response, U.S. Environmental Protection Agency, *OSWER Environmental Justice Task Force Draft Final Report*, presented to Elliott P. Laws, Assistant Administrator, Office of Solid Waste and Emergency Response, U.S. Environmental Protection Agency, OSWER 9200.316 DRAFT, PB94–963224, EPA540/R–94/003, Apr. 25, 1994 (hereafter cited as *OSWER Draft Final Report*).

[14] Gaylord letter, attachments, pp. 3–4.

[15] 30 Weekly Comp. Pres. Doc. 276 (Feb. 14, 1994); Memorandum on Environmental Justice, 30 Weekly Comp. Pres. Doc. 279 (Feb. 14, 1994). Executive Order 12,898 specifically states that it is "intended to supplement but not supersede" Executive Order 12,250, "Leadership and Coordination of Nondiscrimination Laws." Exec. Order No. 12,898, § 6–6, 6–602, 30 Weekly Comp. Pres. Doc. 276, 279 (Feb. 14, 1994). *See* Exec. Order No. 12,250, 3 C.F.R. 298 (1981), *reprinted in* 42 U.S.C. § 2000d-1 (1988).

(including populations) to discrimination under, such programs, policies, and activities, because of their race, color, or national origin.[16]

To assist the Federal agencies with their new responsibilities, Executive Order 12,898 established the Interagency Working Group on Environmental Justice under the leadership of the Administrator of EPA.[17] Under Executive Order 12,898, each Federal agency must develop agencywide environmental justice strategies that identify and address disproportionately high and adverse human health or environmental effects on minority populations and low-income populations.[18] In addition, the Federal agencies, to the extent possible, must collect, analyze, and disseminate information about the health impact of their programs, policies and activities, by race, national origin, or income.[19] Executive Order 12,898 imposes several new responsibilities on the Federal agencies; however, it does not create any independent right to judicial review of the compliance or noncompliance actions of the United States or its agencies or officers.[20] Instead, Executive Order 12,898 is "intended only to improve the internal management of the executive branch."[21]

EPA views Executive Order 12,898 as a strong statement of the administration's commitment to achieving environmental justice and as a guide to agencies' understanding and integration of environmental justice in their policies, programs, and daily activities.[22]

### Enforcing Environmental Justice and Title VI

The Presidential memorandum issued with Executive Order 12,898 emphasizes that existing civil rights laws, such as Title VI, and environmental laws should be used to address environmental hazards in minority communities and low-income communities.[23] Because section 2–2 of Executive Order 12,898 and Title VI of the Civil Rights Act of 1964 focus on protecting individuals from exclusion from participation in, denial of benefits of, or subjection to discrimination in federally funded programs on the basis of race, color, or national origin, enforcement of both initiatives will overlap. Title VI enforcement is "but one part of the Agency's overall efforts to 'enforce' environmental justice,"[24] and, similarly, environmental justice is only one area in which Title VI enforcement applies.

OSWER and EPA generally have provided some clarification on the nexus between these two civil rights enforcement efforts within the Agency. With respect to Title VI, the OSWER report issued by the Environmental Justice Task Force in 1994 notes that under its authorizing statute, the Resource Conservation and Recovery Act of 1976,[25] OSWER does not have the authority to withhold a permit from an applicant in noncompliance with Title VI unless the noncompliance is related to the protection of human health and the environment.[26] The report suggests several interim strategies for ensuring compliance, such as requiring risk assessments and using early baseline health evaluations. The OSWER report also recognizes the need for periodic review of State programs to ensure compliance with Title VI and suggests that OSWER may help finance postaward reviews conducted by the Office of Civil Rights.[27]

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[16] Exec. Order No. 12,898, § 2–2, 30 Weekly Comp. Pres. Doc. 276, 277 (Feb. 14, 1994).

[17] *Id.* § 1–102, at 276.

[18] *Id.* § 1–103, at 277.

[19] *See id.* § 3–302(c), at 278.

[20] *Id.* § 6–609, at 279.

[21] *Id.*

[22] Dan J. Rondeau, Director, Office of Civil Rights; Robert J. Knox, Deputy Director, Office of Environmental Justice; and Gary S. Guzy, Deputy General Counsel, Office of General Counsel, U.S. Environmental Protection Agency, letter to Frederick D. Isler, Acting Assistant Staff Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, Nov. 10, 1994, memorandum enclosure 1, pp. 8–9 (hereafter cited as EPA November 1994 response, enclosure 1).

[23] Memorandum on Environmental Justice, 30 Weekly Comp. Pres. Doc. 279, 280 (Feb. 14, 1994) (emphasis added).

[24] Carol M. Browner, Administrator, U.S. Environmental Protection Agency, letter to Mary F. Berry, Chairperson, U.S. Commission on Civil Rights, April 19, 1995, attachment, "Environmental Protection Agency, Comments on Chapters 4 and 11 of *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally-Assisted Programs*," p. 8 (hereafter cited as Browner letter, attachment).

EPA stated that "[t]he Title VI regulations . . . provide EPA the authority to promote environmental equity policies,"[28] but indicated that the nondiscrimination provisions of Title VI were narrower than those addressed by "environmental justice."[29] EPA has examined how it can use its civil rights compliance program to implement its environmental justice program, and, in some aspects, it has integrated Title VI enforcement with the environmental justice program.[30]

Because EPA's environmental justice and Title VI programs address discrimination on the basis of race, color, or national origin and because EPA has integrated aspects of both enforcement efforts, this chapter evaluates the civil rights enforcement aspects of both programs.

## Organization, Budget, Staffing, and Workload of EPA's Civil Rights Enforcement Functions

### Organization

EPA's civil rights functions for environmental justice and Title VI operate through the coordinated efforts of the Office of Civil Rights, the Office of General Counsel, the Office of Enforcement and Compliance Assurance, and the Office of Environmental Justice.[31] The Offices of Civil Rights, General Counsel, and Enforcement and Compliance Assurance share EPA's environmental justice responsibilities for complaint investigations and compliance reviews.[32] The Office of Civil Rights works with the Office of General Counsel on Title VI issues unrelated to environmental justice. The Office of Civil Rights and the Office of Environmental Justice provide technical assistance, staff training, outreach, and education for their respective issue areas. To ensure effective and efficient coordination on environmental justice issues, EPA is reevaluating its current organizational structure.[33]

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[25] 42 U.S.C. §§ 6901–6992k (1988 & Supp. V 1993).

[26] *OSWER Draft Final Report*, p. 13.

[27] Ibid., pp. 13–16.

[28] Gaylord letter, attachments, Q. 11, p. 11.

[29] Ibid., Q. 16, pp. 13–14.

[30] Ibid., Qs. 14 and 15, pp. 12–13. See discussion below on p. 424 (EPA added four attorneys and one attorney detailee from the Department of Justice to OCR to conduct EPA's civil rights obligations and the civil rights aspects of its environmental justice mandate.). See also discussion on p. 431 (A memorandum of understanding clarified the involvement of the Office of General Counsel, the Office of Enforcement and Compliance Assurance, the Office of Environmental Justice, program offices, and regional offices with investigations of Title VI environmental justice complaints by the Office of Civil Rights.).

[31] Although the Office of Environmental Justice does not perform enforcement activities in the context of complaint investigations and compliance reviews, it does provide technical assistance, training, outreach, and education on environmental justice issues and Executive Order 12,898. Rodney Cash, Associate Director, and Daniel Searing, Attorney-Advisor, Office of Civil Rights; Tony Guadagno, Assistant General Counsel, and Mary O'Lone, Environmental Justice Coordinator, Office of the General Counsel, Environmental Protection Agency, interview in Washington, D.C., May 8, 1995 (hereafter cited as EPA May 1995 interview). The Commission considers all of these activities as necessary elements of a Title VI enforcement program.

[32] The Office of Enforcement and Compliance Assurance investigates noncivil-rights-related environmental justice complaints that do not raise Title VI claims. Browner letter, attachment, p. 8.

### *Office of Civil Rights*

The Office of Civil Rights (OCR), located in EPA's Office of the Administrator, is primarily responsible for EPA's enforcement of Title VI. It also coordinates its environmental justice activities with other EPA headquarters and regional offices through OCR's participation in a variety of work groups and meetings on implementation of Executive Order 12,898.[34] Some OCR staff serve as members of the National Environmental Justice Advisory Council's coordinating committee.[35] OCR staff also participates with the Office of Enforcement and Compliance Assurance, the Office of General Counsel, and the Office of Environmental Justice in the formulation of environmental justice enforcement policies for the Task Force on Enforcement and Compliance of the Interagency Working Group.[36] Furthermore, OCR, in consultation with the Office of General Counsel, advises EPA headquarters and regional program offices on the requirements of Title VI and Executive Order 12,898, whenever necessary.[37]

In addition to enforcing civil rights statutes pertaining to EPA's federally assisted and federally conducted programs,[38] OCR is responsible for EPA's internal civil rights activities, such as equal employment opportunity, affirmative action, and special emphasis programs within EPA and Title VII discrimination complaints brought by employees against the Agency. Although EPA is not a designated agency under Title II of the Americans with Disabilities Act of 1990,[39] OCR does receive disability complaints. It researches those complaints to determine whether EPA has jurisdiction and refers complaints to appropriate agencies.[40]

OCR is headed by a Director who reports officially to the Administrator of EPA. However, for daily routine matters, the Director reports to EPA's Deputy Chief of Staff, who is two levels removed from the Administrator.[41] This reporting structure, which EPA maintains is "good management,"[42] suffices for the ordinary, day-to-day concerns of the civil rights enforcement functions.

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[33] Ibid., p. 9.

[34] Ibid., p. 11.

[35] Ibid.

[36] Ibid.

[37] *See* Gaylord letter, attachments, p. 11.

[38] These include: Title VI of the Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 252 (codified as amended at 42 U.S.C. §§ 2000d to 2000d-7 (1988)); section 13 of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92–500, 86 Stat. 903 (codified at 33 U.S.C. § 1251 (1988)); Title IX of the Education Amendments of 1972, Pub. L. No. 92–318, Title IX, 86 Stat. 373 (codified as amended at 20 U.S.C. §§ 1681–1688 (1988)); the Age Discrimination in Employment Act of 1975, Pub. L. No. 94–135, 89 Stat. 728 (codified as amended at 42 U.S.C. §§ 6101–6107 (1988)); section 504 of the Rehabilitation Act of 1973, Pub. L. No. 93–112, title V, § 504, 87 Stat. 394 (codified as amended at 29 U.S.C. § 794 (1988 & Supp. V 1993)). *See* U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Environmental Protection Agency, Q. 22, pp. 17–18 (hereafter cited as EPA Survey).

[39] Pub. L. No. 101–336, 104 Stat. 327, 337 (codified at 42 U.S.C. §§ 12,131—12,134 (1988). *See* Browner letter, attachment, p. 2.

[40] Browner letter, attachment, p. 4.

[41] EPA Survey, Q. 20, p. 17.

[42] Browner letter, attachment, p. 2.

EPA does not view this arrangement as preventing OCR's Director from "command[ing] the attention of the Administrator on important issues."[43] However, the Commission maintains that, for crucial issues such as official policy decisions and budget and resource needs, the direct reporting line between the Administrator and Director of OCR is necessary to ensure that civil rights enforcement concerns are fully considered and addressed in the Agency's administrative decisions on budget allocations and staffing matters and in top-level policy meetings.[44]

OCR is divided into three programs: 1) Discrimination Complaints and External Compliance Program, 2) Operations and Evaluation, and 3) Affirmative Action and Special Emphasis.[45] The Discrimination Complaints and External Compliance Program is the only OCR program with external civil rights enforcement responsibility. However, it also has responsibility for investigating internal civil rights complaints.[46]

This OCR organizational structure hampers the Agency's ability to enforce Title VI effectively. EPA has no single administrative unit with external civil rights responsibilities. Instead, the same office houses both internal and external civil rights enforcement responsibilities,[47] and the same program that investigates external civil rights complaints also examines the internal ones. In the past, OCR's organizational structure has compromised EPA's external civil rights enforcement effort, including its enforcement of Title VI, for its internal civil rights responsibilities. According to the former Deputy Director of OCR and head of the Discrimination Complaints and External Compliance program, the increasing number of internal civil rights complaints in recent years has curtailed EPA's Title VI and other external civil rights compliance activities.[48] Furthermore, she indicated that EPA has placed priority on internal equal employment opportunity (EEO) complaints over external civil rights compliance activities, and Title VI enforcement has suffered.[49]

In addition to the headquarters Discrimination Complaints and External Compliance staff, EPA's regional offices have staff assigned to Title VI enforcement.[50] The regional offices, like the

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[43] *See* ibid. EPA supports its position by noting that, in FY 1992, the year of the incumbent OCR Director's selection, there were 21.7 FTE work years, and, currently, OCR has 28.3 FTE work years. Ibid.

[44] The Commission notes that until August 1994, when OCR added four attorneys to its staff because of the development of the environmental justice program, OCR had only one full-time staff person devoted to the entire external compliance program. EPA November 1994 response, enclosure 1, p. 26. It was not until the President issued Executive Order 12,898 and emphasized that existing civil rights laws should be used to address environmental justice concerns that OCR received increased staffing.

EPA maintains that the existing reporting structure has not been problematic for OCR under the current administration, as demonstrated by the recent staff increases. Furthermore, OCR's Director participates in weekly senior staff meetings with the Administrator. EPA May 1995 interview. The Commission agrees that participation in senior staff meetings promotes attention to civil rights concerns; however, to ensure that civil rights enforcement becomes an integrated interest in all of EPA's program, planning, and resource operations, the official reporting line should not be ignored.

[45] *See* OCR organization chart submitted to the Commission in response to a document request.

[46] Ibid.

[47] *See* U.S. Environmental Protection Agency, *Equal Employment Opportunity Manual*, ch. 2, "External Compliance Programs," pp. 2–3 (1989) (hereafter cited as EPA *Equal Employment Opportunity Manual*).

[48] Suzanne Olive*, Deputy Director, Discrimination Complaints and External Compliance, Office of Civil Rights, Office of the Administrator, U.S. Environmental Protection Agency, and Rodney Cash, Equal Opportunity Specialist, Discrimination Complaints and External Compliance, Office of Civil Rights, Office of the Administrator, U.S. Environmental Protection Agency, interview in Washington, D.C., June 9, 1994, p. 1 (hereafter cited as Olive/Cash interview). (*deceased).

[49] Ibid.

[50] *See* EPA *Equal Employment Opportunity Manual*, pp. 2–3; EPA Survey, Q. 37, p. 31.

Discrimination Complaints and External Compliance Program at headquarters, investigate both internal and external civil rights complaints.[51] Regional EEO officers provide supervision to collateral-duty onsite EEO counselors in the internal complaints process. They also make preparatory arrangements for EEO investigators when they visit on site.[52] These duties are the extent of their participation in internal civil rights enforcement functions. Once OCR has formally accepted external civil rights complaints, the regional EEO officers are responsible for investigating them with the exception of Title VI environmental justice complaints.[53] Regional civil rights staff coordinate with OCR in implementing OCR's programs and policies for which OCR bears ultimate responsibility.[54] However, these regional staff members do not report to OCR.[55] EPA has three area directors of civil rights who report to OCR, but who have no external compliance responsibilities.[56]

The organization of EPA's regional offices also presents concerns for ensuring effective enforcement of Title VI. As with headquarters OCR, the consolidation of internal and external civil rights enforcement functions into each regional office is problematic for Title VI enforcement. The arrangement impairs Title VI enforcement when a greater focus on internal Title VII and equal employment opportunity issues divert the regional EEO officers' attention away from external civil rights investigative responsibilities. Although the regional EEO officers do not have responsibility for investigating internal civil rights complaints, they nevertheless have internal civil rights obligations.[57] In addition to organizational placement of functions within the regional offices, the reporting authority from regional offices to headquarters is of concern. To ensure that communications between regional and headquarters civil rights offices recognize all needs and concerns for external civil rights enforcement, the Agency would need to hold the area directors accountable for regional and field external civil rights functions.

### *Office of General Counsel*

The Office of General Counsel (OGC) serves as the primary legal advisor to the Administrator of EPA and is ultimately responsible for interpreting EPA statutes and regulations.[58] OGC and OCR staff work jointly on significant legal, policy, and enforcement issues arising under Title VI, including Title VI environmental justice issues. OCR had few attorney staff until the recent addition of four attorney-advisors in 1994.[59] Prior to that staff increase, it is unclear whether OCR relied solely on OGC for the drafting of revisions to regulations, legal analysis, and other legal support. With the addition of attorney staff to OCR, it has the capabilities of performing some of its own civil rights-related legal support work within the office and coordinating with OGC on other legal matters. Recently, OCR and OGC developed a memorandum of understanding to facilitate coordination between them in processing Title VI complaints.[60] OGC currently maintains a tracking system for EPA judicial and administrative environmental justice cases that generates monthly status reports, including Title VI complaints, as well as other cases raising environmental justice issues.[61]

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[51] *See* EPA Survey, Q. 37, p. 31. *See also* Browner letter, attachment, p. 2.

[52] Browner letter, attachment, p. 2.

[53] Ibid. Most external civil rights complaints investigated at the regional level involve section 504 of the Rehabilitation Act. EPA May 1995 interview.

[54] EPA Survey, Q. 37, p. 31; Browner letter, attachment, p. 3.

[55] EPA Survey, Q. 37, p. 31.

[56] Ibid. The three EPA area directors of civil rights are located in Research Triangle Park, North Carolina; Cincinnati, Ohio; and Las Vegas, Nevada. *See* OCR organization chart submitted to the Commission in response to a document request; EPA *Equal Employment Opportunity Manual*, pp. 2–3; EPA Survey, Q. 37, p. 31.

[57] EPA noted that the impact of an increased internal civil rights workload at the regional level is not as great as an impact at the headquarters level because headquarters OCR handles the formal complaints investigation process. The regional EEO officers' functions involve an informal, less-involved intake process of complaints. EPA May 1995 interview.

[58] *See* 40 C.F.R. § 1.31 (1994).

[59] EPA November 1994 response, enclosure 1, p. 13.

OGC's role with respect to the environmental justice program involves legal counseling on civil rights laws and Executive Order 12,898. OGC's primary role in implementing Executive Order 12,898 is to provide legal counseling to EPA headquarters and regional offices on all aspects of the order. Counseling in this area encompasses a broad range of activities, including guidance on the scope and effect of Executive Order 12,898.[62]

To ensure effective and efficient counseling on environmental justice matters, the General Counsel designated an OGC environmental justice coordinator in November of 1993.[63] Currently, the environmental justice coordinator works exclusively on environmental justice issues and is responsible, among other things, for coordinating legal advice on the implementation of Executive Order 12,898, with and among the various divisions of OGC.[64]

A team of approximately 20 OGC attorneys coordinates with, and provides counseling to, EPA program offices on environmental justice issues, including those arising under Executive Order 12,898.[65] The principal team consists of the associate general counsel for grants and intergovernmental, the assistant general counsel for intergovernmental, and the environmental justice coordinator. As one of its primary responsibilities, the team devotes a major portion of each work day to environmental justice. The General Counsel, her two deputies, and her special assistant also devote a substantial amount of time to environmental justice issues. The remainder of the team consists primarily of staff from OGC's other divisions. Two of the OGC attorneys currently working on environmental justice issues have responsibilities that overlap with other civil rights functions.[66]

To help ensure legal coordination and consistency on a national basis, OGC established an Environmental Justice Work Group, which consists of one or more representatives from various OGC divisions as well as each Office of Regional Counsel and regional OECA and OCR.[67] The work group meets on a monthly basis or more frequently, as appropriate, through telephone conferences. OGC recently hosted a national meeting of the work group in conjunction with EPA's National Environmental Justice Advisory Council meeting.[68]

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[60] Browner letter, attachment, p. 7. *See* Dan J. Rondeau, Director, Office of Civil Rights, U.S. Environmental Protection Agency, memorandum to Jean C. Nelson, General Counsel, U.S. Environmental Protection Agency, re: Title VI Complaint Processing—Consultation Between the Office of General Counsel and the Office of Civil Rights, Jan. 31, 1995 (Browner letter, attachment) (hereafter cited as Rondeau memorandum).

[61] Ibid., p. 14.

[62] EPA November 1994 response, enclosure 1, p. 10. To date, OGC's counseling activities include a memorandum to senior EPA managers on the requirements of Executive Order 12,898, and its accompanying Presidential memorandum. *See* Jean C. Nelson, General Counsel, U.S. Environmental Protection Agency, memorandum to Carol M. Browner, Administrator, U.S. Environmental Protection Agency, Mar. 17, 1994 (EPA November 1994 response, enclosure 12); "Fact Sheet on Executive Order 12,898, and Its Accompanying Presidential Memorandum" (undated) (EPA November 1994 response, enclosure 13).

[63] EPA November 1994 response, enclosure 1, p. 12.

[64] Ibid.

[65] Ibid., p. 13. EPA indicated that the period during which the Commission conducted interviews at the Agency and EPA submitted its responses to the Commission's surveys and letters was "a time of intense legal counseling on environmental justice issues." Browner letter, attachment, p. 8. EPA added that although OGC continues to place a high priority on environmental justice, currently its counseling to program offices on environmental justice is on an as-needed basis. Browner letter, attachment, p. 8.

[66] EPA November 1994 response, enclosure 1, p. 13.

[67] Ibid., p. 12.

In addition to its role as legal counselor, OGC assists in the implementation of Executive Order 12,898.[69] OGC participates on two task forces of the Interagency Working Group.[70] The General Counsel serves as EPA's representative on the Policy and Coordination Subcommittee of the Interagency Working Group and provides policy advice in her capacity as co-chair of the Guidance and Enforcement and Compliance Task Force. With regard to internal EPA activities, the Principal Deputy General Counsel is a member of the Agency's Environmental Justice Policy Work Group, which coordinates environmental justice activities throughout the Agency.[71]

### *Office of Environmental Justice*

The Office of Environmental Justice (OEJ) is the central point of coordination and information to all headquarters and regional program offices. It is a central repository for all information and activities related to the implementation of Executive Order 12,898.[72] OEJ has assigned three full-time equivalents (FTEs) to administer the requirements of Executive Order 12,898.[73] The major responsibility of OEJ is to coordinate interagency efforts and provide OEJ staff to the Interagency Working Group on Environmental Justice.[74] In addition, OEJ provides training on Executive Order 12,898 to interagency and intra-Agency staff, which includes EPA environmental justice coordinators and coordinators from other Federal agencies. OEJ staff is also responsible for arranging public meetings in compliance with Executive Order 12,898.[75]

OEJ currently is engaged in the largest geographic-specific public health study ever attempted to examine the relationship between hazardous environmental exposure and the communities at greatest risk.[76] OEJ is working with a variety of agencies, including the Center for Disease Control and Prevention, State health departments, and historically black colleges, to reduce and prevent environmental hazards from disproportionately and adversely affecting minority and low-income populations along highly industrialized areas of the Mississippi River.[77]

OEJ maintains the toll-free Environmental Justice Citizens Hotline that receives complaints, inquiries, and requests for counseling and information from citizens on environmental justice issues and other environmental concerns. In addition, OEJ issues an annual report highlighting

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[68] Ibid.

[69] Ibid., p. 11.

[70] Ibid.

[71] Ibid.

[72] Ibid, p. 12.

[73] Ibid., p. 14.

[74] Ibid., p. 11.

[75] Ibid.

[76] Ibid., p. 6.

[77] Ibid.

Agency achievements in environmental justice initiatives.[78]

### Budget, Staffing, and Workload

OCR's budget is earmarked in the EPA appropriation.[79] OCR's overall budget has increased over time, from $1.5 million in 1988 to $1.8 million in 1993.[80] However, there was no indication whether the amounts allocated to external civil rights enforcement, and Title VI in particular, also had increased over time. Moreover, there was no evidence that OCR tracked its expenditures on external or Title VI civil rights enforcement activities in order to identify separately the resource needs for meeting existing obligations and for accomplishing goals.[81]

Generally, OCR does not have adequate staff to enforce Title VI. EPA's headquarters staff assigned to external civil rights enforcement declined from six full-time equivalents in 1984, to one FTE in 1994.[82] Before August 15, 1994, OCR had only one full-time staff person devoted to the entire external compliance program.[83] In response to OCR's increasing environmental justice workload, EPA provided OCR with additional FTEs to conduct investigations and other external compliance functions.[84] Specifically, EPA detailed four attorney-advisors FTEs from other offices to conduct EPA's statutory civil rights obligations, as well as its environmental justice mandate.[85] EPA assigned these FTEs permanently to OCR when its FY 1995 budget was approved.[86] At the beginning of FY 1995, EPA added a detailee from the Department of Justice to OCR's external compliance division. Currently, OCR has an equal opportunity manager (one-half FTE), an equal opportunity specialist, and four attorneys devoted to external civil rights enforcement.[87] EPA's

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[78] Ibid., p. 14.

[79] EPA Survey, Q. 29, p. 21.

[80] Ibid., Q. 33, p. 25.

[81] For fiscal year 1976, EPA reported its expenditures on Title VI enforcement for its A11 Budget Submission to the Office of Management and Budget. Based on that report, EPA's expenditures on actual Title VI enforcement was $158,000. U.S. Department of Justice, Civil Rights Division, "Agency A11 Results," *Title VI Forum*, vol. 2, no. 2 (Summer 1977), 6. EPA maintains that at a meeting convened by the Commission's project staff on October 20, 1993, representatives from numerous Federal agencies providing Federal financial assistance informed the Commission staff members that the objective of identifying Title VI budget resources was unrealistic. EPA indicates that each agency's representative made it clear that their external programs do not disaggregate resources by statute and that most intimated that compliance activities are not conducted separately by statute, rather they are integrated to promote efficiency and eliminate duplication. *See* Browner letter, attachment, p. 3. The Commission recognizes that many enforcement and compliance activities integrate the enforcement efforts of a variety of civil rights statutes. It does not dispute this process as long as the integrated activities address all of the needs and requirements of each civil rights statute integrated. Furthermore, the Commission maintains that tracking expenditures and resource allocation to each particular civil rights statute does not necessitate separating each enforcement and compliance activity by statute, nor is the process unrealistic.

[82] EPA Survey, Q. 26, p. 21. EPA headquarters has one full-time equal opportunity specialist who divides his time between external civil rights compliance activities and Title II of the Americans with Disabilities Act (ADA). *See* Olive/Cash interview, p. 2.

[83] EPA November 1994 response, enclosure 1, p. 26. Based on EPA's A11 Budget Submission to the Office of Management and Budget for fiscal year 1976, EPA had no full-time staff devoted to Title VI enforcement in fiscal year 1976. U.S. Department of Justice, Civil Rights Division, "Agency A11 Results," *Title VI Forum*, vol. 2, no. 2 (Summer 1977), p. 6.

[84] Ibid., p. 9.

[85] Ibid. *See also* Dan J. Rondeau, Director, Office of Civil Rights, U.S. Environmental Protection Agency, memorandum to Michael Gelobter, Office of the Administrator, U.S. Environmental Agency, re: OCR's Title VI Workplan, Aug. 3, 1994 (EPA November 1994 response, enclosure 3) (hereafter cited as 1994 Title VI Workplan).

[86] Browner letter, attachment, p. 3.

[87] November 1994 response, enclosure 1, p. 26. *See also* FY 1994 Title VI Workplan, enclosure 3; EPA May 1995 interview.

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regional offices have approximately 3.25 FTEs aggregate for external civil rights enforcement, including Title VI .[88]

Of OCR's four full-time attorney advisors assigned to its external compliance program, three had significant program expertise and one had experience in both Title VI and environmental justice issues upon beginning their work with OCR.[89] The detailee from the Department of Justice is a senior Title VI attorney now assisting OCR with investigating environmental justice complaints and developing an environmental justice investigation and procedures manual.[90] OCR also operates with the assistance of OGC in researching and developing the legal standards against which environmental justice claims are measured.[91]

Although OCR received additional full-time staff members for external civil rights activities as a result of the EPA's recent emphasis on environmental justice, to date, there is little evidence that OCR has used this staff to address the deficiencies in the Agency's Title VI program, such as updating its regulations, guidelines, policies, and procedures to reflect recent developments in Title VI and the increased use of block-grant-funded Federal programs, implementing postaward reviews, monitoring States' Title VI compliance programs, or providing technical assistance or training.[92] This is especially true for Title VI issues unrelated to environmental justice. However, OCR's staff members have begun conducting outreach and education on Title VI. For example, some of the attorney-advisors have given presentations on Title VI enforcement at various panels and conferences attended by recipients, State officials, and program beneficiaries.[93]

As EPA's civil rights budget and staffing declined in the 1980s, its workload has increased, notably with the enactment of the Americans with Disabilities Act. EPA indicated the passage of the act facilitated the filing of disability complaints that OCR must research and refer to other Federal agencies. According to EPA, these responsibilities for implementing the Americans with Disabilities Act "have had the effect of diluting OCR's ability to focus on the preexisting provisions," such as Title VI.[94] Furthermore, as indicated above, EPA's internal civil rights enforcement has overwhelmed external civil rights activities in recent years, resulting in less attention on Title VI enforcement. The recent increase in staff will improve OCR's ability to manage its increased workload although OCR currently lacks sufficient staff to ensure effective enforcement in all areas of civil rights and Title VI in particular.

### Regulations, Guidelines, Policies, and Procedures

EPA has regulations and procedures to form the basis for a Title VI enforcement program. However, both the regulations and procedures have deficiencies in some respects. Although EPA has issued some guidelines and policies addressing Title VI environmental justice issues, it has not developed program-specific guidelines or issued many policy statements interpreting Title VI issues unrelated to environmental justice.

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[88] *See* EPA Survey, Qs. 23 and 35, pp. 18, 29.

[89] November 1994 response, enclosure 1, p. 13. The entire OCR staff is supervised by an Equal Opportunity Manager. Ibid. Since the fall of 1994, the four attorney-advisors have acquired on-the-job training in Title VI enforcement. EPA May 1995 interview.

[90] Ibid.

[91] Ibid.

[92] EPA indicated that since August 1994, its civil rights staff has worked on these Title VI issues, in addition to a number of complex issues that arise in processing Title VI complaints involving environmental programs. Browner letter, attachment, p. 1. However, no specific details were provided to the Commission.

[93] May 1995 interview.

[94] EPA Survey, Q. 27, p. 21.

Similarly, EPA has provided little guidance to clarify requirements, procedures, or policy positions when both Title VI and environmental justice issues are involved.

### Regulations

EPA's Title VI regulations[95] do not follow the Title VI regulations of the U.S. Department of Education (DOEd), which the Department of Justice designated and most other Federal agencies use as model Title VI regulations. Instead, EPA's regulations combine implementation and enforcement for all of the civil rights statutes governing EPA's federally assisted programs.[96] Separate and specific Title VI regulations promote a strong Title VI program. For example, section 504 of the Rehabilitation Act covers nondiscrimination in both federally assisted and federally conducted programs. Title VI proscribes discrimination in federally assisted programs only. Consequently, the requirements and procedures applying to federally conducted programs will differ from those for federally assisted programs. Unified regulations can serve a Title VI enforcement program adequately if they include all necessary elements for an effective Title VI enforcement program and if they clearly indicate the provisions applying to Title VI. EPA's regulations do place the provisions on nondiscrimination for federally conducted programs in a separate section from the provisions on nondiscrimination in federally assisted programs.[97] However, the provisions on nondiscrimination in federally assisted programs do not clearly indicate whether each requirement for applicants and recipients and each compliance procedure apply to all laws on nondiscrimination in federally assisted programs or only certain statutes specifically.[98] The combination of these requirements and procedures is confusing to the reader without clear references to the statutes to which they apply.

In 1990, EPA revised the portion of the regulations pertaining to discrimination on the basis of disability to require conformance with the Uniform Federal Accessibility Standards.[99] However, EPA has not updated the portions dealing with Title VI since it first published the regulations in 1984.[100] Therefore, EPA's regulations do not reflect recent Title VI developments, such as the enactment of the Civil Rights Restoration Act of 1987 or the issuance of Executive Order 12,898. For example, the Civil Rights Restoration Act of

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[95] 40 C.F.R. Part 7 (1994).

[96] These include: Title VI of the Civil Rights Act of 1964, Pub. L. No. 88352, 78 Stat. 252 (codified as amended at 42 U.S.C. §§ 2000d to 2000d-7 (1988)); section 13 of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92500, 86 Stat. 903 (codified at 33 U.S.C. § 1251 (1988)); Title IX of the Education Amendments of 1972, Pub. L. No. 92318, Title IX, 86 Stat. 373 (codified as amended at 20 U.S.C. §§ 16811688 (1988)); the Age Discrimination in Employment Act of 1975, Pub. L. No. 94135, 89 Stat. 728 (codified as amended at 42 U.S.C. §§ 61016107 (1988)); section 504 of the Rehabilitation Act of 1973, Pub. L. No. 93112, title V, § 504, 87 Stat. 394 (codified as amended at 29 U.S.C. § 794 (1988 & Supp. V 1993)). EPA Survey, Q. 22, p. 18.

EPA explained that its unified civil rights regulations were formulated at a time when such a model was being encouraged by the Department of Justice and the Office of Management and Budget. It indicated that this model was an early attempt at regulatory reduction. According to EPA, "[T]his model has served EPA well, and provides ample enforcement authority." Browner letter, attachment, p. 4.

[97] *See* 40 C.F.R. Part 12 (1994) (federally conducted programs). *See also* 40 C.F.R. Part 7 (1994) (federally assisted programs).

[98] *See* 40 C.F.R. Part 7, Subparts D & E (1994).

[99] 49 Fed. Reg. 31,528 (1984).

[100] *See* 40 C.F.R. Part 7 (1994).

1987 defined expressly the phrase "programs and activities," clarifying that Title VI's coverage extends to the entire State or local agency or department, or other public or private entity, through which Federal financial assistance is delivered.[101] EPA's regulations do not reflect this clarification. EPA's regulations define EPA's authority with respect to the "denial, annulment, termination, or suspension" of funding as applying to "the particular program or the part of it in which the discrimination was found."[102] The legislative history of the Civil Rights Restoration Act of 1987,[103] however, discusses the principle that an agency may terminate funds not only if discrimination is "pinpointed" to the program receiving funds, but also if the federally assisted program is "infected" by discrimination elsewhere in the operation of the recipient.[104] Clarification is necessary to settle any confusion regarding EPA's position on the fund termination issue since passage of the act in 1987.

EPA's regulations meet the U.S. Department of Justice's requirement that they contain an appendix listing the federally assisted programs to which the regulations apply.[105] However, because EPA has not updated the appendix since 1984, the appendix may not include all of EPA's federally funded programs.[106] The appendix also does not distinguish State continuing programs from other programs. This feature is helpful in indicating those instances when a State or local agency is responsible for enforcing Title VI with respect to subrecipients or subgrantees and assessing its own Title VI compliance efforts.

The regulations contain language prohibiting most of the discriminatory practices listed in the U.S. Commission on Civil Rights' 1966 *Compliance Officer's Manual*.[107] They do not explicitly prohibit different standards or requirements for participation.[108] The regulations have a broader provision that prohibits "use of criteria or methods of administering its programs which have the effect of subjecting individuals to discrimination."[109] EPA's regulations do not explicitly prohibit discrimination in activities conducted in a facility built with Federal funds.[110] The regulations do require recipients to submit assurances of nondiscrimination "obligat[ing] the recipient, or transferee, during the period the real property or structures are used for the purpose for which EPA assistance is extended."[111] However, this requirement is not a blanket prohibition on discrimination in activities in EPA-funded facilities. Given that many EPA programs fund construction projects, such as wastewater treatment plants, the omission of a prohibition against discrimination in facilities built with EPA funds is of concern.

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[101] *See* 42 U.S.C. § 2000d-4a (1988). For further discussion see chapter 2 of this report.

[102] 40 C.F.R. § 7.130(b)(4) (1994).

[103] Pub. L. No. 100259, 102 Stat. 28 (codified as amended at 20 U.S.C. §§ 1681note, 1687, 1687note, 1688, 1688note (1988); 29 U.S.C. §§ 706, 794 (1988 & Supp. V 1993); 42 U.S.C. §§ 2000d-4a, 6107 (1988)).

[104] 42 U.S.C. § 2000d-4a (1988). *See* discussion in chapter 2, pp. ___. EPA indicated that "[its] understanding of this matter is that there is no government-wide position on this issue." Browner letter, attachment, p. 4. The Agency noted that it will be considering the issue in view of possible remedies in their Title VI environmental justice complaints and that pending coordination with the Department of Justice, their regulations will be revised as appropriate. Ibid.

[105] 40 C.F.R. Part 7, Appendix A (1994).

[106] Olive/Cash interview, p. 3.

[107] U.S. Commission on Civil Rights, *Compliance Officer's Manual: A Handbook of Compliance Procedures under Title VI of the Civil Rights Act of 1964*, p. 1 (1966) (hereafter cited as *Compliance Officer's Manual*). For a further discussion of the discriminatory practices, see chap. 4.

[108] EPA indicated that their regulations do contains such provisions and cited 40 C.F.R. §§ 7.35(a)(2), (5) and 7.30.

[109] 40 C.F.R. § 7.35(b) (1994).

[110] *See* 40 C.F.R. § 7.35 (1994).

[111] *Id.* § 7.80(a)(2).

### Guidelines, Policies, and Procedures

EPA's guidelines, policies, and procedures for Title VI and environmental justice are either nonexistent or outdated. EPA has not issued Title VI guidelines for any of its federally assisted programs, as required by the Department of Justice. It has issued few policy statements on Title VI.[112] However, the Director of OCR forwarded a letter to the Commission, elaborating on EPA's policy with regard to terminating funds: "[t]ermination of all Federal assistance throughout an organization might be justifiable if the discrimination finding was egregious and systemic, and if the recipient was both unrepentant and unwilling to come into compliance."[113] EPA maintains that the circumstance outlined by its Director's policy position is similar to the principle restored by the Civil Rights Restoration Act of 1987 that an agency may terminate funds both if discrimination is "pinpointed" to the use of those funds and if the use is "infected" with discrimination elsewhere in the operation of the recipient.[114] However, this policy statement does not establish standards of what constitutes "egregious and systemic" or how this relates to discrimination that is "pinpointed" as opposed to use that is "infected" with discrimination. This type of elaboration is necessary so that recipients, program participants, actual and potential beneficiaries, and the public generally will be well-informed of the practical meanings of EPA's policies and their rights and responsibilities under Title VI.

EPA's recent focus on environmental justice activities has increased the Agency's attention to Title VI issues because they may overlap with environmental justice issues. However, to date, the Agency has provided no guidelines or policies to clarify the overlap between these two types of issues.

EPA's regulations contain basic procedures for preaward and postaward compliance reviews, complaint investigations, and enforcement actions.[115] In addition, EPA issued more detailed procedures for preaward reviews and complaint investigations in 1984, but it has not updated these procedures since that time.[116] EPA also issued procedures for postaward compliance reviews in 1986.[117]

Despite its increased activity resulting from the environmental justice mandate, OCR has not yet developed specific procedures for assessing environmental justice risks in its compliance activities or its complaint investigations. Instead, OCR has focused primarily on environmental justice complaints and analyzes them on a case-by-case basis using Title VI procedures.[118] EPA acknowledged that it "is currently placing a high priority on processing individual complaints"; however, it indicated that it also is devoting resources to coordinate with other Federal agencies on addressing complex legal and policy issues.[119]

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[112] Dan J. Rondeau, Director, Office of Civil Rights, U.S. Environmental Protection Agency, letter to Stuart J. Ishimaru, Acting Staff Director, U.S. Commission on Civil Rights, Mar. 1, 1994, pp. 1–2 (hereafter cited as Rondeau March 1994 letter).

[113] Dan J. Rondeau, Director, Office of Civil Rights, U.S. Environmental Protection Agency, letter to Frederick D. Isler, Deputy Assistant Staff Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, Apr. 1, 1994 (hereafter cited as Rondeau April 1994 letter).

[114] Pub. L. No. 100–259, 102 Stat. 28 (codified as amended at 20 U.S.C. §§ 1681note, 1687, 1687note, 1688, 1688note (1988); 29 U.S.C. §§ 706, 794 (1988 & Supp. V 1993); 42 U.S.C. §§ 2000d-4a, 6107 (1988)). *See also* CRRA Senate Committee Report, p. 20, 1988 U.S.C.C.A.N. 3, 22; Board of Pub. Instruction v. Finch, 414 F.2d 1068 (5th Cir. 1969).

[115] 40 C.F.R. §§ 7.105–7.135 (1994).

[116] *See* U.S. Environmental Protection Agency, Office of Civil Rights, *Assistance Administration Manual*, 1984, chap. 23; U.S. Environmental Protection Agency, Office of Civil Rights External Compliance Program, *Procedures Manual*.

[117] U.S. Environmental Protection Agency, "Fiscal Year 1990 Civil Rights Implementation Plan," p. 4 (hereafter cited as EPA FY 1990 Implementation Plan).

[118] *See* EPA November response, enclosure 1, p. 3.

Although EPA maintains that the variety of pollutants require evaluation of claims on a case-by-case basis, EPA has considered performing a national level assessment of the overall cumulative effects posed by environmental pollution.[120] According to EPA, by combining available data, it may be possible to sketch profiles of individual exposures to a variety of important pollutants. This assessment could enable EPA to determine whether different populations are subject to disparate pollution loadings and whether there are populations for whom average exposure assumptions significantly misrepresent their exposure.[121] EPA did not indicate when or how it will conduct this study.

## Process of Title VI and Environmental Justice Enforcement

Except in the areas of preaward reviews, complaint investigations, and outreach and education, EPA's Title VI enforcement program is generally limited. Although EPA's environmental justice activities have encouraged improvement of its Title VI enforcement, there is no evidence that EPA's process of Title VI enforcement has been positively affected except to the extent that Title VI overlaps with environmental justice issues. For example, currently, EPA's external civil rights enforcement program consists primarily of environmental justice claims filed under Title VI.

Despite the fact that EPA's Title VI responsibilities have always remained the same, EPA has only recently taken the initiative, under the auspices of environmental justice, to provide the procedures, policies, guidance, training, and outreach necessary to enforce Title VI effectively. OCR and OGC are working closely with the Department of Justice to develop investigative techniques, to identify cases for referral to the Department of Justice, and to provide guidance and training on Title VI rights and responsibilities to EPA staff, recipients of Federal financial assistance, and the general public.[122]

EPA is placing "special emphasis" on environmental justice issues, as evidenced by the assignment of additional staff and the creation of a detail from the Department of Justice.[123] EPA is developing environmental justice enforcement and compliance initiatives under its many other statutory and regulatory authorities.[124] According to EPA, "this emphasis will continue for the foreseeable future, but the operation is integrated with the OCR function within EPA.[125] The extent to which the emphasis on environmental justice will benefit any other area of Title VI unrelated to environmental justice is uncertain.

### Preaward Reviews

OCR conducts preaward (desk-audit) reviews with assistance from the regional EEO officers.[126] It generally performs preaward reviews for the State revolving fund program only and not for EPA's other grants programs.[127]

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[119] Browner letter, attachment, p. 8.

[120] *See* EPA November 1994 response, enclosure 1, p. 3.

[121] Ibid.

[122] Ibid., p. 9.

[123] Ibid., p. 27.

[124] Ibid., p. 1 note.

[125] Ibid.

[126] EPA Survey, Q. 25(e)(1), p. 19.

[127] Ibid., Q. 40, p. 34. The State revolving funds programs supplanted EPA's wastewater treatment and construction grants program. Ibid.

For its preaward reviews, EPA uses a preaward compliance review report form that asks applicants to provide information on the proposed project or program.[128] The preaward report form asks applicants about any discrimination complaints pending against them and any compliance reviews performed on them by other Federal agencies. It requests specific information about the majority and minority populations to be served by the proposed project or program in comparison to their representation in the affected community and the populations being served by existing projects and programs.[129]

EPA originally designed the preaward report form to apply to EPA's wastewater treatment and construction grants, later replaced by the State revolving fund program, but it modified the form in 1988 to apply to all of EPA's grant recipients. However, EPA indicated that OCR has not administered the form to programs other than the State revolving fund program.[130] OCR staff explained that, until recently, EPA's Office of Grants and Debarment resisted using EPA's preaward compliance form for any program other than the State revolving fund program because of concerns regarding the application of the form, which was originally designed for construction projects, to grant programs not involving construction.[131] Therefore, EPA's preaward Title VI enforcement focuses almost exclusively on its State revolving fund program.

Altogether, EPA conducted 75 preaward reviews in 1993, reflecting a steady decline in the number of reviews performed since 1984, when it conducted 712 preaward reviews.[132] Thus, not only does EPA's preaward review system cover only one of its many federally assisted programs, but the number of preaward reviews accomplished by EPA has declined substantially over time.

### Postaward Desk-Audit and Onsite Compliance Reviews

Although postaward reviews, both desk-audit and onsite compliance reviews, are critical to uncovering and eliminating violations of Title VI, EPA conducts virtually no postaward reviews of its recipients. EPA has not performed any postaward desk-audit reviews since at least 1988,[133] and it has not conducted any postaward onsite compliance reviews during the last 5 years.[134] Therefore, EPA has no meaningful proactive system for discovering noncompliance among its recipients.

However, EPA recently has shown interest in developing a system of compliance reviews. Through its External Compliance Review Pilot Program, the Agency has been developing a postaward questionnaire to be tested in five States. The test will assist in determining the types of information that State agencies which participate in the State revolving fund program and the general environmental assistance grants should submit.[135]

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[128] U.S. Environmental Protection Agency, Preaward Compliance Review Report For All Applicants Requesting Federal Financial Assistance, EPA Form 4700-4 (Rev. 1/90) (hereafter cited as Preaward Report Form).

[129] Ibid.

[130] *See* EPA Survey, Q. 40, p. 34; Rondeau April 1994 letter, p.2.

[131] Olive/Cash interview, p. 2; Browner letter, attachment, p. 5.

[132] EPA Survey, Q. 41, p. 35.

[133] Ibid., Q. 45, p. 39.

[134] Rondeau April 1994 letter. EPA's FY 1994 Civil Rights Implementation Plan reports that EPA completed three postaward reviews during 1993, but does not indicate under which statute these reviews were conducted or whether they were desk audit or onsite reviews. *See* EPA FY 1994 Implementation Plan, p. 4. Based on EPA's A–11 Budget Submission to the Office of Management and Budget for fiscal year 1976, EPA conducted no onsite compliance reviews in fiscal year 1976. *See* U.S. Department of Justice, Civil Rights Division, "Agency A–11 Results," *Title VI Forum*, vol. 2, no. 2 (Summer 1977), p. 6.

[135] Browner letter, attachment, p. 5.

## Complaint Investigations

Some Title VI claims do not raise environmental justice claims. Although most complaints filed involve discrimination in the use or results of federally financed programs or activities, Title VI also prohibits discrimination in the access to, or benefits of, Federal financial assistance.[136] For example, a minority community may base a Title VI claim on an EPA State recipient's failure to inform them of the availability of grant funds, rather than on any disproportionate environmental health effects resulting from an EPA-funded activity. OCR would handle these as purely Title VI complaints.

Some environmental justice complaints will raise Title VI claims; others will involve only environmental laws. OCR is the only office within EPA responsible for processing environmental justice complaints filed under Title VI.[137] However, through a memorandum of understanding, it established procedures for including OGC and other offices in the complaint process. Upon receipt of such a complaint, OCR provides courtesy copies of the complaint, and later any notices of acceptance, to OGC, OEJ, OECA, the headquarters program office, and the affected region. OCR requests that these offices communicate any concerns or information to OCR within 2 weeks, and any responses to acceptance of the complaint thereafter. OCR works, in consultation with OGC, on the complaint, including efforts at voluntary compliance and termination of assistance.[138]

OGC and the relevant program office or offices handle environmental justice issues that do not raise Title VI claims.[139] For example, OGC and the air program office would handle a non-Title VI claim from a minority community challenging the issuance of an air permit based on a failure of the permitting body to address adequately the community's comments about air pollution health effects.[140] The Office of Enforcement and Assurance investigates environmental justice complaints that do not raise Title VI claims.[141]

EPA has not had an effective complaint investigations system in the past. During the past 5 years, EPA has received few complaints and investigated even fewer of those complaints. In 1993, EPA received two Title VI complaints but reported that it did not complete investigations on them.[142] Furthermore, EPA's overall complaint backlog for federally assisted programs, including Title VI complaints, has grown over time. From a backlog of 9 complaints at the end of 1989, it grew to 16 complaints at the end of fiscal year 1992.[143] Over the past several years, EPA has been unable to complete more than one complaint investigation in any year.[144]

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[136] 42 U.S.C. § 2000d (1988).

[137] EPA November 1994 response, enclosure 1, p. 22.

[138] *See* Rondeau memorandum.

[139] EPA November 1994 response, enclosure 1, p. 23.

[140] Ibid.

[141] Browner letter, attachment, p. 8.

[142] EPA Survey, Qs. 71 and 74, pp. 52, 54. EPA indicated that these two complaints involved court actions that are awaiting disposition and that it just received its first response on one of the complaints since September 1993. EPA May 1995 interview. Based on EPA's A–11 Budget Submission to the Office of Management and Budget, EPA received 3 Title VI complaints in fiscal year 1976, and it investigated 3 complaints that same fiscal year. *See* U.S. Department of Justice, Civil Rights Division, "Agency A–11 Results," *Title VI Forum*, vol. 2, no. 2 (Summer 1977), p. 6.

[143] The 1994 plan is inconsistent with these numbers, since it reports a backlog of 9 complaints at the end of fiscal year 1992 rather than the 16 reported in the 1993 plan. EPA noted that most of the backlogged complaints dealt with section 504 of the Rehabilitation Act.

[144] *See, e.g.*, EPA FY 1990 Implementation Plan, Workload and Performance Data; EPA FY 1994 Implementation Plan, Workload and Performance Data.

OCR staff estimated that, as a result of the environmental justice initiative, the number of Title VI complaints received by EPA may quadruple in fiscal year 1994. From February 1994 to May 1995, OCR received 21 environmental justice Title VI complaints.[145] OGC has also been involved in a number of environmental justice cases that do not raise Title VI issues.[146]

To accommodate the expected increase in complaints, EPA enlarged OCR's staff by four detailees from offices within EPA.[147] The positions of these four staff members became permanent with the approval of the FY 1995 budget.[148] OCR also received a detailee from the Department of Justice in 1995. OCR created teams of complaint investigators to handle its current complaint caseload.[149] According to the workplan, OCR's external compliance staff have reviewed their cases and are preparing investigative plans, in consultation with EPA's Office of General Counsel (OGC), for use in both conciliation conferences and case investigations.[150]

### Deficiencies, Remedies, and Sanctions

Because EPA's Title VI enforcement program is limited, EPA rarely, if ever, finds recipients in noncompliance. Specifically, from 1976 to 1993, no Federal assistance case resulted in deferral, suspension, or termination of funds.[151] Therefore, the Agency has not negotiated remedies, imposed sanctions, or denied, deferred, suspended, or terminated Federal funds under Title VI in recent years.[152] It seldom takes advantage of one of Title VI's greatest strengths, the availability of sanctions. Title VI is significantly different from many other civil rights laws in that a Federal agency can secure compliance through termination of the Federal funds. An agency's failure to impose this sanction, much less any other sanction, may lead recipients to suspect, reasonably, that any sanction for noncompliance is a low probability. The termination of funding is a drastic remedy that can harm beneficiaries if the federally funded program already is in place. However, an active Title VI enforcement program that identifies noncompliance, coupled with strong sanctions, such as deferral or suspension of funds, as probable consequences, better ensures compliance with Title VI.[153]

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[145] EPA May 1995 interview. Of those 21 complaints, 4 are awaiting decisions of acceptability for investigation; 1 was dismissed for mootness; 9 to 10 were accepted for investigation; and 8 were rejected for lack of jurisdiction or untimeliness. Ibid.

[146] Ibid., p. 25. EPA May 1995 interview.

[147] EPA November 1994 response, enclosure 1, p. 9. *See also* FY 1994 Title VI Workplan, enclosure 3.

[148] Browner letter, attachment, p. 3.

[149] 1994 Title VI Workplan (EPA November 1994 response, enclosure 3). The teams consist of one principle attorney assigned to a complaint and another assigned as backup. The teams meet in committee on major issues. EPA May 1995 interview.

[150] Ibid.

[151] Rondeau April 1994 letter; EPA Survey Q. 79, p. 57. Based on EPA's A–11 Budget Submission to the Office of Management and Budget, EPA issued one finding of noncompliance in fiscal year 1976. *See* U.S. Department of Justice, Civil Rights Division, "Agency A–11 Results," *Title VI Forum*, vol. 2, no. 2 (Summer 1977), p. 6.

[152] EPA has negotiated settlements on complaints or findings of noncompliance involving section 504 of the Rehabilitation Act. EPA May 1995 interview.

[153] EPA maintains that Title VI enforcement is better served if an agency succeeds in fostering voluntary compliance. EPA will actively seek that goal prior to fund termination or referral to the Department of Justice. EPA indicated that both referral to the Department of Justice and, in appropriate cases, funding termination are tools which the Agency will use if necessary. It views compliance as the best standard by which to measure Title VI enforcement. Browner letter, attachment, p. 6. The Commission agrees that voluntary compliance should be the first step at seeking compliance. However, Congress created the fund termination sanction as an option to agencies, and especially in the cases in which a recipient or other entity is in continuing violation of Title VI, fund termination or the threat of it may be the most effective means of achieving compliance with Title VI.

## Outreach, Education, and Technical Assistance

EPA's Title VI civil rights education, outreach, and technical assistance efforts are minimal. In its survey response, EPA reported that it publicizes some program information in Spanish.[154] Although EPA has not published any documents that specifically address civil rights enforcement of Title VI and environmental justice, OCR is developing a pamphlet on Title VI and environmental justice which should be available in the coming months for distribution to recipients, beneficiaries, and the public generally.[155] There is no indication that EPA has a formal Title VI outreach and education program although OCR staff members have begun to give presentations on Title VI enforcement at panels and conferences.[156] Given the nature of EPA's federally assisted programs, most persons are probably unaware that they have Title VI rights with respect to these programs. Active outreach, education, and technical assistance programs are necessary to inform individuals of their rights and responsibilities under Title VI. They facilitate an increase of legitimate Title VI complaints and reduce tendencies that individuals will file frivolous ones. Consequently, EPA's limited efforts in developing these programs hinder an effective Title VI enforcement program.

OCR and regional grants staff are supposed to provide technical assistance to recipients to assist them in fulfilling their Title VI responsibilities.[157] However, EPA does not conduct training seminars for nor does it provide technical assistance to State and local agency staff or recipients.[158] One of EPA's objectives in its 1990 Civil Rights Implementation Plan was to conduct a survey of applicants/recipients to determine the need and/or interest in a seminar explaining civil rights responsibilities.[159] However, EPA did not indicate in its subsequent Civil Rights Implementation Plans or survey response that it had done so. Given the complexity of the issues involved, the need for such technical assistance is paramount.

In its 1994 Title VI workplan, OCR reiterated its responsibility to provide technical assistance in the forms of advice, guidance, and training to EPA program and regional officials, recipients, and beneficiaries on their respective civil rights responsibilities.[160] OCR recognized that, to fulfill its responsibilities in this area, it must develop an education program to inform State and local recipients of EPA assistance available for their responsibilities under Title VI.[161]

Executive Order 12,898 provides for greater public participation and improved access to information for the general public on human health and environmental issues.[162] To achieve these goals, Executive Order 12,898 requires the Interagency Working Group to hold public meetings for the purpose of factfinding, receiving public comments, and conducting inquiries relating to environmental justice issues.[163] The Interagency Working Group must prepare for public review a summary of the issues raised at the public meetings.[164] In addition, Executive Order 12,898 allows the public to submit recommendations on environmental justice to the Federal agencies which the agencies must forward to the Interagency Working Group.[165] Executive Order 12,898 also requires that the Federal agencies make an effort to ensure that all public documents, notices, and hearings on human health or the environment are concise, understandable, and accessible to the English-speaking and limited-English-speaking public.[166]

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[154] EPA Survey, Q. 47, p. 40.

[155] EPA May 1995 interview.

[156] EPA May 1995 interview.

[157] Ibid., Qs. 25(g)-(h), pp. 19–20.

[158] Ibid., Qs. 51–54, pp. 41–42. EPA is planning to conduct training programs for regional staff and recipients on environmental justice and Title VI. EPA May 1995 interview.

[159] EPA FY 1990 Implementation Plan, p. 10.

[160] 1994 Title VI Workplan (EPA November 1994 response, enclosure 3).

[161] Ibid.

[162] Exec. Order No. 12,898, § 5–5, 30 WEEKLY COMP. PRES. DOC. 276, 278–79 (Feb. 14, 1994).

[163] *Id.* § 5–5(d), at 278.

Recently, EPA proposed a rule to allow greater public involvement in the hazardous waste treatment permitting process under the Resource Conservation and Recovery Act.[167] Although EPA has not finalized the rule yet, the Assistant Administrator encourages regional administrators to initiate permitting activities, when EPA is the permitting authority, that assure the opportunity for meaningful participation by all segments of the public, including non-English speakers.[168] In addition, the Assistant Administrator asked the regional administrators to encourage State permitting authorities to conduct similar public activities.[169]

OEJ is primarily responsible for education and outreach on environmental justice issues. Since the issuance of Executive Order 12,898, OEJ has provided awareness training to EPA headquarters and regional office staff, as well as grants for environmental educational programs and assistance to communities in local environmental justice programs. OEJ also provided a grant for the Hispanic Network Public Radio to provide environmental justice education and outreach to Latino communities. In addition, OEJ has published several environmental justice materials in Spanish. OEJ also has conducted education and outreach in various forms at numerous conferences, colleges, community organizations, and businesses.[170]

Since the issuance of Executive Order 12,898, OEJ has established a small grants program funded in FY 1994 through the OEJ office base budget in the amount of $500,000. For FY 1995, OEJ obtained a congressional add-on fund of $3 million for education and outreach. In addition, the OEJ has assisted the Office of Pollution Prevention in coordinating its FY 1995 environmental justice grants program.[171] Although these initiatives undoubtedly will improve outreach, education, and technical assistance with regard to environmental issues involving Title VI, they will not fully address the need for strong outreach, education, and technical assistance programs for Title VI generally. Hopefully, OCR's recognition in its 1994 Title VI Workplan of its responsibilities in these areas will prompt improvements in the Title VI program generally and not solely in environmental justice.

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[164] *Id.* § 5–5(d), at 278–79.

[165] *Id.* § 5–5(a), at 278.

[166] *Id.* § 5–5(b),(c), at 278. To date, the Interagency Working Group, Outreach Task Force has developed a draft environmental justice participation checklist designed to assist the Federal agencies in their outreach efforts. In addition, the Outreach Task Force is in the early stages of planning several public meetings in the next 6 months at various locations throughout the country. EPA November 1994 response, enclosure 1, p. 16. *See also* ibid., enclosure 10, "Public Participation & Accountability Subcommittee Recommendations to the Full NEJAC Committee."

[167] 59 Fed. Reg. 28,680 (1994). *See also* Elliot P. Laws, Assistant Administrator, Office of Solid Waste and Emergency Response, U.S. Environmental Protection Agency, memorandum to regional administrators, re: "Application of Enhanced Public Participation and Stronger Combustion Permitting Requirement," May 23, 1994 (EPA November 1994 response, enclosure 9).

[168] Elliot P. Laws, Assistant Administrator, Office of Solid Waste and Emergency Response, U.S. Environmental Protection Agency, memorandum to regional administrators, re: "Application of Enhanced Public Participation and Stronger Combustion Permitting Requirement," May 23, 1994.

[169] Ibid.

[170] *See* ibid., pp. 18–20.

[171] Ibid., p. 20.

## Oversight of Continuing State Programs

EPA distributes approximately 80 percent of its Federal financial assistance through State environmental agencies and the State revolving fund in ongoing programs.[172] It specified that "State agencies receiving EPA assistance to administer State-authorized environmental programs must comply with Title VI and EPA's implementing regulations."[173] However, the Agency does not have any regulations, guidelines, policies, or procedures designed specifically for continuing State programs. EPA neither monitors State Title VI compliance activities on a minimal basis nor requires States to submit self-assessment reports on their own Title VI compliance efforts.[174] EPA does not delegate any Title VI compliance responsibility over subrecipients to its State recipients.[175] Furthermore, the Agency also does not require States to submit methods of administration showing how they intend to ensure compliance. This lack of effort is of serious concern to the Commission. It reflects a failure to implement an effective system for ensuring that State-administered programs receiving EPA funds are in compliance with Title VI.

According to one OCR official, EPA has never effectively examined the Title VI compliance activities of continuing State programs.[176] In fact, OCR stated in its 1994 Title VI workplan:

> To date, EPA has been remiss in carrying out its pre-award compliance responsibilities, particularly with regard to the continuing environmental program grants to State environmental agencies. These grants, along with the State Revolving Fund Program, account for nearly 80 percent of the Agency's assistance dollars. In addition, the Agency has the authority to conduct periodic compliance reviews of any recipients program or activities receiving EPA assistance including the request of data and information, and may conduct on-site reviews when it has reason to believe that discrimination is occurring in such programs and activities. The agency's shortcomings in this area raise of issue of [*sic*] whether EPA is legally liable for failure to enforce Title VI and the other external civil rights statutes.[177]

Although OCR, in its 1994 Title VI workplan, recognized the importance of reviewing State criteria for selecting subrecipients of EPA funds, OCR does not currently review State criteria as part of its compliance reviews.[178]

Similarly, EPA has not developed any oversight procedures of State and local agencies specifically for environmental justice.[179] It has not issued an environmental justice directive beyond Title VI.[180] To date, EPA's only approval of State programs consists of environmental justice assurances provided voluntarily by two States.[181] Although EPA recognizes the importance of monitoring and oversight, it currently plans only to "consider the use of appropriate environmental justice assurances on a nationwide basis," as part of the development of its final environmental justice strategy.[182] However, the requirement that States provide these assurances is not enough to ensure the Agency's proper oversight of State continuing programs. EPA would need to hold States accountable by requiring them to develop a system of compliance reviews and complaint investigations, and it would have to monitor States' actions or inactions to ensure they meet their obligations. Therefore, the lack of any oversight procedures impedes enforcement of environmental justice in EPA-funded programs.

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[172] Olive/Cash interview, p. 1.

[173] Browner letter, attachment, p. 7.

[174] EPA November 1994 response, enclosure 1, p. 2. EPA indicated that State and local authorities generally made most land-use siting decisions and, therefore, EPA does not have legal authority to review State siting decisions under its organic statutes. EPA Survey, Q. 7, p. 9. *See also* Browner letter, attachment, p. 7. However, under EPA-implemented and EPA-authorized State programs, the Agency may consider State siting decisions in conjunction with standard setting, permitting, and other activities. Browner letter, attachment, p. 7.

[175] EPA November 1994 response, enclosure 1, p. 2.

[176] Olive/Cash interview, p. 2.

[177] 1994 Title VI Workplan, p. 2 (EPA November 1994 response, enclosure 3).

[178] EPA November 1994 response, enclosure 1, p. 4. *See also* 1994 Title VI Workplan (EPA November 1994 response, enclosure 3).

## Staff Training

EPA does not have an adequate system for training its staff on the enforcement of Title VI and other civil rights statutes. OCR does not require civil rights compliance training for all new employees with external civil rights or EEO responsibilities.[183] In addition, although OCR has conducted civil rights training seminars for regional staff in the past, OCR has not conducted a regional training program since 1991.[184] Staff training is the standard way an agency can ensure that its civil rights staff perform pre- and postaward reviews, complaint investigations, and negotiations of remedies and sanctions according to the agency's Title VI procedures and policies. Staff training that promotes comprehensive knowledge of or expertise in Title VI, its compliance and enforcement process, statistical analysis, and negotiation and dispute resolution strategies leads to a more efficient and effective Title VI compliance and enforcement program. Staff will understand the many subtleties and ways discrimination can surface, and they will have the skills to identify this discrimination and resolve the complaints or noncompliance effectively and quickly. An inadequate or nonexistent training system seriously affects the Title VI program and impairs its effectiveness.

## Data Collection and Analysis

EPA's Preaward Compliance Review Report Form is the only tool used by EPA to collect racial and ethnic data on populations and communities served by EPA's federally assisted programs. However, OCR and EPA's Office of Grants and Debarment are currently engaged in an External Compliance Review Pilot Program to determine what kinds of information to collect from State environmental agencies as a condition for receiving funds.[185] The pilot program focuses primarily on the continuing State environmental grants received by State environmental agencies and on the State revolving fund program.[186]

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[179] Executive Order 12,898 addresses Federal agencies only. *See* Exec. Order No. 12,898, § 2–2, 30 Weekly Comp. Pres. Doc. 276, 277 (Feb. 14, 1994). Consequently, the environmental justice program focuses on Federal agencies' activities rather than State and local agencies' conduct. EPA May 1995 interview.

[180] EPA November 1994 response, enclosure 1, p. 25.

[181] Ibid.

[182] *See* ibid.

[183] EPA Survey, Q. 49, p. 41.

[184] Ibid., Q. 50, p. 41. OCR has plans to conduct a training program for regional staff and recipients on Title VI and environmental justice. EPA May 1995 interview.

[185] Dan J. Rondeau, Director, Office of Civil Rights, U.S. Environmental Protection Agency and Harvey G. Pippen, Jr., Director, Office of Grants and Debarment, U.S. Environmental Protection Agency, memorandum to regional administrators, re: External Compliance Review Project, May 4, 1994.

OCR considers racial and ethnic data as part of its Title VI program. It uncovers socioeconomic demographic data, in addition to racial and ethnic data, for environmental justice issues.[187] OCR evaluates and analyzes these data, as appropriate, in its investigative process.[188] The collection of socioeconomic demographic data, in addition to racial and ethnic data, is helpful in identifying discrimination under Title VI. In 1992, 33.3 percent of individuals below the poverty level in the United States were black, 29.3 percent were of Hispanic origin, and 14.5 percent were of other nonwhite races. These percentages combined reflect that over half of those individuals below poverty level, 62.6 percent, are either black or of Hispanic origin, and 77.1 percent were nonwhite.[189] Because minorities are disproportionately poorer than whites by population percentages, a combination of racial and ethnic data and socioeconomic data is instrumental in identifying discriminatory practices relating to Title VI and environmental justice.[190]

## Civil Rights Implementation Plans

The Commission reviewed EPA's Civil Rights Implementation Plans for 1990 through 1994. The 1990 and 1994 plans are base-year plans. The 1990 plan covers the period from 1990 to 1993, and the 1994 plan covers 1994 through 1997. In general, the plans do not fulfill the purposes envisioned for them by the Department of Justice.[191] They do not provide sufficient information about external civil rights enforcement for the public to become informed or for the Department of Justice to evaluate EPA's civil rights enforcement. The plans give almost no information about OCR's approach to civil rights enforcement for federally assisted programs.[192]

Furthermore, there is no indication that OCR uses the plans as a planning tools in order to maximize the effectiveness of OCR's existing resources. EPA's selection of goals and objectives and its progress reports are superficial attempts to comply with the Department of Justice's requirements, rather than serious efforts to engage in systematic planning. In 1990, EPA adopted the following long-range goals:

- Goal 1. Maximize the number of recipients in compliance with civil rights requirements through a preventive program of outreach, technical assistance, and monitoring.[193] Major objectives under this goal included a preaward and postaward review system for all program categories, a Title VI poster, a generic fact sheet about Title VI responsibilities, a generic preaward compliance review form, and field seminars for applicants/recipients on civil rights responsibilities.[194]

- Goal 2. Provide the necessary management oversight policy direction to assure that the

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[186] Ibid., p. 1.

[187] EPA November 1994 response, enclosure 1, p. 2.

[188] Ibid., p. 3.

[189] *See* U.S. Bureau of the Census, *Current Population Reports*, cited in U.S. Department of Commerce, *Statistical Abstract of the U.S.*, 1994, Table 727.

[190] See also Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 Nw. U.L. Rev. 787, 795–96 (1993).

[191] *See* chapters 3 and 4 for a discussion of the purpose of the Civil Rights Implementation Plans.

[192] The section describing EPA's approach to civil rights enforcement for federally assisted programs refers to EPA's EEO Manual, which was has not yet been published. *See* EPA FY 1990 Implementation Plan, p. 4.

[193] EPA FY 1990 Implementation Plan, p. 7.

[194] Ibid.

> agency's federally assisted programs result in timely, consistent, and effective civil rights enforcement.[195] Major objectives under the goal included publication of a preaward compliance review handbook, provision of preaward review training for grant specialists, expansion of field external compliance program personnel as needed, and conclusion of the signing and publication of a delegation agreement with the Department of Education.[196]

These goals are very general and ambitious given the limited nature of EPA's existing Title VI enforcement and available resources. The goals are unrelated to OCR's budget, staffing, and resources or its projected workload, and the plan offers no indication that OCR was actively planning how to accomplish these goals and objectives.

EPA's Civil Rights Implementation Plans for the years 1991 to 1993 are very brief, approximately 5 pages. OCR produced progress reports providing updates on the status of the 1990 goals and objectives and on any changes in staff responsibilities or policies from year to year.[197] In addition, OCR addressed its plans and accomplishments during each fiscal year that was covered under the 1990 plan. These plans give no indication that any of the Title VI goals and objectives presented in the 1990 Civil Rights Implementation Plan had been achieved. For example, during fiscal year 1990, OCR planned to conduct a pilot postaward compliance review project in which OCR would ask all regional officers to conduct a predetermined number of reviews during a 6-month period. At the end of that time, OCR intended to evaluate the results to determine regional Title VI training and resource needs.[198] In 1991, OCR planned to conduct the project, and also intended to hold a training seminar for field equal opportunity specialists who were assigned to conduct the project's postaward compliance reviews.[199] EPA also stated that it would publish a draft preaward compliance review handbook and have a Title VI poster printed for distribution.[200] The 1992 and 1993 Civil Rights Implementation Plans indicated no change in the status of the project or the handbook, and the 1993 plan dropped plans for the Title VI poster because OCR found copies of a previously printed poster.[201]

Another indication that EPA has not accomplished its 1990 goals and objectives is that the long-range goals and major objectives in EPA's 1994 plan are nearly identical to those in the 1990 plan.[202] In fact, the 1994 plan mirrors the 1990 plan in almost all respects. Thus, the 1994 Civil Rights Implementation Plan reflects an agency whose Title VI enforcement has not progressed since 1990.

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[195] Ibid.

[196] Ibid., p. 8.

[197] EPA made no significant changes in any area until 1993, when some of the objectives were deleted.

[198] EPA FY 1990 Implementation Plan, p. 6.

[199] U.S. Environmental Protection Agency, "Fiscal Year 1991 Civil Rights Implementation Plan," p. 2 (hereafter cited as EPA FY 1991 Implementation Plan).

[200] Ibid.

[201] U.S. Environmental Protection Agency, "FY 1992 Civil Rights Implementation Plan," p. 2 (hereafter cited as EPA FY 1992 Implementation Plan); U.S. Environmental Protection Agency, "FY 1993 Civil Rights Implementation Plan," pp. 4, 5 (hereafter cited as EPA FY 1993 Implementation Plan).

[202] *See* EPA FY 1994 Implementation Plan, pp. 7–8, and EPA FY 1990 Implementation Plan, pp. 7–8.

## Findings and Recommendations

### Organization, Budget, Staffing, and Workload

#### Organization

**Finding:** The reporting arrangement established for the U.S. Environmental Protection Agency's civil rights program to the Deputy Chief of Staff suffices for daily routine matters related to civil rights enforcement.[203] However, for critical issues, such as resource needs and official agency policy positions, the official reporting line to the Administrator is necessary to communicate and ensure a clear understanding of the importance of civil rights considerations. The Commission found no indication that access of the Director of the Office of Civil Rights to the Administrator was impeded on crucial matters.

**Recommendation:** Although, in practice, the reporting line for routine civil rights enforcement concerns is conducive to efficient management and operation, this reporting structure should not become so systematic as to prevent participation of the Director of OCR in important executive meetings that discuss budget, staffing, and policy decisions. The reporting arrangement should allow serious consideration of the needs of the civil rights enforcement programs. Furthermore, the Agency Administrator should assume leadership in civil rights enforcement and ensure that civil rights concerns receive necessary prominence and consideration in the budget, planning, program, and legal offices throughout the Agency.

**Finding:** The reporting authority from regional offices to the headquarters OCR is not sufficient for an effective external civil rights enforcement program. An organizational arrangement in which regional civil rights staffs report to area or regional directors is logical and efficient at this level. However, since the area directors of civil rights have no external compliance responsibilities, regional civil rights staffs with external civil rights responsibilities have no direct authority figures to supervise and manage their activities at the local level.[204] Headquarters OCR's reliance on the area directors to communicate directions and guidance on external civil rights efforts to regional staff hampers effective external civil rights enforcement programs.

**Recommendation:** EPA must hold the area/regional directors accountable for the external civil rights compliance and enforcement activities performed by the regional staff. By making these directors responsible for external civil rights functions at the regional level, there is a greater guarantee that these directors will clearly and emphatically convey concerns about the external civil rights function, such as the need for policy guidance on issues or the necessity of increased resources. Furthermore, the headquarters OCR will have more assurance that regional civil rights staffs follow the direction provided by the headquarters office because the area or regional directors will have responsibility for supervising their efforts.

**Finding:** The consolidation of internal and external civil rights enforcement functions at both the headquarters and regional level impedes a strong external civil rights enforcement program. Regional EEO officers must provide supervision and logistical assistance on internal complaints processes in addition to investigating external civil rights complaints. OCR's Deputy Director confirmed that, in recent years, the increasing numbers of internal civil rights complaints impeded external civil rights compliance efforts. Although EPA's current emphasis on environmental justice maintains attention on external civil rights efforts, the present organizational structure of internal and external civil rights enforcement functions leaves external civil rights enforcement activities at risk to an increased workload in Title VII complaints and equal employment opportunity matters.

**Recommendation:** EPA should separate internal and external civil rights enforcement functions if not into distinct offices, then into two detached units. This arrangement will facilitate effective development of both internal and external civil rights enforcement programs. It will assist in the tracking of expenditures, staff assignments, and compliance and enforcement activities for external civil rights independent internal enforcement efforts. It also will allow planning efforts to concentrate solely on external civil rights matters and eliminate the need to adjust external civil rights enforcement efforts to the demands of an increased internal civil rights workload. Similarly, headquarters and regional civil rights staff with external civil rights enforcement responsibilities should perform only those external enforcement activities. The regional EEO officers should not participate in internal civil rights matters. OCR should train officers to provide the supervision and assistance exclusively to internal civil rights enforcement activities and allow regional EEO officers and other staff members with external civil rights compliance and enforcement responsibilities to focus completely on Title VI, environmental justice, and other external civil rights enforcement efforts.

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[203] *See* pp. 418–19.

[204] *See* pp. 419–20.

**Finding:** With the development of a memorandum of understanding, the Office of General Counsel (OGC) and OCR have taken steps to maintain a coordinated working relationship on Title VI complaint processing, in addition to their joint efforts on legal, policy, and enforcement issues.[205] OCR is building its own legal support staff within the civil rights office with the assignment for four attorney detailees to permanent positions. Consequently, OCR has the capacity to conduct legal analysis, draft the Agency's civil rights regulations, and develop policies on civil rights legal, policy, and enforcement issues. The relationship between OGC and OCR clearly is not one of complete reliance on OGC for legal support.

**Recommendation:** Because OCR has legal support staff within its office, its attorneys should function as the primary legal advisors on civil rights laws related to EPA-funded programs. OCR should rely on its attorneys to draft revisions to civil rights regulations and write policies on civil rights legal or enforcement issues. OCR attorneys should advise civil rights enforcement and program staff on the legal issues related to civil rights complaints, compliance reviews, and other civil rights enforcement activities. In essence, OCR attorneys should function as the primary legal experts on civil rights laws affecting the Agency. However, their efforts should not supplant OGC's role as the primary legal advisor to the Administrator and its responsibilities for interpreting EPA statutes and regulations. OGC should review and finalize the EPA's civil rights regulations in consultation with OCR attorneys. OGC should provide analysis and advice on the relation of the non-civil-rights-related EPA statutes and regulations to civil rights laws, regulations, or policies governing EPA-assisted programs.

### Budget, Staffing, and Workload

**Finding:** The Commission found no evidence that OCR tracked its expenditures for external civil rights compliance and enforcement activities.[206] Without such a mechanism, OCR cannot monitor its resources needs for fulfilling existing day-to-day external civil rights obligations, and effective long-range planning efforts for external civil rights enforcement goals will be hindered.

**Recommendation:** OCR must develop a database system for tracking expenditures and staffing assignments on external civil rights compliance and enforcement activities generally and on Title VI activities specifically. The Commission recognizes that OCR integrates compliance activities to encompass many civil rights laws, thereby eliminating duplication and promoting efficiency. The Commission also acknowledges that complaints received at EPA can involve Title VI claims in addition to issues under other civil rights laws. However, with a database system for monitoring expenditures and staffing assignments, OCR staff can assign codes to each civil rights law enforced by EPA. When OCR headquarters and regional staff perform compliance reviews, conduct complaint investigations, or provide staff training, technical assistance, or outreach, or education, they should apply all codes applicable to these activities. In this way, OCR can maintain an accurate accounting of civil rights enforcement with respect to each civil rights law. The database system will enable OCR to make assessments of resource allocations and staffing assignments. More important, the system will allow OCR to identify the extent of focus on particular civil rights laws, such as Title VI.

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[205] *See* p. 422.

[206] *See* p. 424.

**Finding:** Generally, OCR has an inadequate number of staff to enforce Title VI effectively. The recent addition of new staff members shows promise for improving the EPA's Title VI enforcement program.[207] One of the new attorney-advisors has experience in both Title VI and environmental justice issues. However, in recent years, OCR's workload has increased as individuals have filed increasing numbers of disability discrimination complaints and as internal civil rights enforcement activities have diverted some resources and attention away from external civil rights enforcement. Because EPA only recently added new staff members to OCR, the Commission recognizes that it cannot fully assess whether these additional staff members have improved the Title VI enforcement effort. However, OCR's recent activity has been in Title VI environmental justice issues, rather than improving the Title VI program as a whole.

**Recommendation:** Because OCR has experienced an increase in staff so recently, it should assess its external civil rights enforcement program and identify which areas of the program clearly need an increase in staffing. OCR should then evaluate whether reassignments will address these needs or whether an larger increase in staff is imperative. OCR should consider focusing at least some staff on addressing the existing deficiencies in the overall Title VI program, such as in revising and updating EPA's nondiscrimination regulations, developing practical Title VI guidelines, implementing an active Title VI policy program and compliance review process, updating Title VI compliance and enforcement procedures, and developing strong oversight, coordination, and monitoring mechanisms for State continuing programs. Furthermore, as mentioned above, OCR should not integrate internal and external civil rights enforcement assignments. Otherwise, as in the case of the regional EEO officers, an increase in internal civil rights enforcement workloads will divert staff resources away from external civil rights enforcement efforts. In order to improve and ensure that external civil rights programs are effective, OCR should allow its civil rights staff assigned to external civil rights enforcement to work exclusively on those functions.

## Regulations, Guidelines, Policies, and Procedures

### Regulations

**Finding:** EPA does not have separate Title VI regulations. It combines its Title VI provisions with other nondiscrimination regulations.[208] EPA has separated nondiscrimination regulations for federally conducted programs from federally assisted programs, a logical approach since compliance and enforcement procedures for federally conducted programs may differ from those for federally assisted programs. However, within the nondiscrimination regulations for federally assisted programs, the sections on requirements for applicants and recipients and compliance procedures do not clearly indicate which requirements and procedures are applicable to Title VI. The reader of these provisions may logically conclude that all requirements and procedures apply to Title VI when, in fact, some are specific to section 504 of the Rehabilitation Act.

**Recommendation:** The Commission maintains that separate Title VI regulations are most conducive to ensuring an effective Title VI enforcement program. Unified regulations can serve a Title VI enforcement program adequately; however, EPA must ensure that the regulations include all necessary elements for an effective Title

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[207] *See* pp. 424–25.

[208] *See* pp. 425–26.

VI enforcement program. In addition, EPA must clarify the sections on requirements for applicants and recipients and compliance procedures so that there is no confusion as to which requirement or procedures apply to Title VI.

**Finding:** EPA's nondiscrimination regulations contain most of the necessary elements for a Title VI enforcement program. However, the regulations lack provisions reflecting recent developments in Title VI and the issuance of Executive Order 12,898. They do not reflect the clarification on the coverage of Title VI provided by the Civil Rights Restoration Act of 1987.

**Recommendation:** In order to include all necessary elements in EPA's regulations, the Agency must add to its definitional section the meaning of "program or activity" as clarified by the Civil Rights Restoration Act of 1987. Furthermore, EPA must issue comprehensive and detailed guidelines and procedures to address Title VI-specific requirements for applicants and recipients or compliance procedures tailored to Title VI.

EPA should also add provisions that reflect requirements imposed by Executive Order 12,898 as they relate to Title VI. Because the environmental justice program is an entity in and of itself with only some overlaps with Title VI, EPA also should consider issuing separate environmental justice regulations or adding a section in its unified regulations for this program.

**Finding:** The appendix listing EPA's federally assisted programs has not been updated since 1984 and does not distinguish State continuing programs from other programs.[209]

**Recommendation:** EPA should update its appendix to ensure that it contains all of the Agency's federally assisted programs. In the alternative, it should publish a catalog, brochure, or pamphlet listing these programs that it would update when new federally assisted programs are created and old ones are eliminated. The regulations then should make reference to this document. The document also should be used for educational purposes to inform individuals of their rights with respect to these programs.

**Finding:** EPA's nondiscrimination regulations do not have specific prohibitions that explicitly proscribe discrimination conducted in a facility built with Federal funds.[210]

**Recommendation:** In light of the fact that EPA funds many construction projects, such as those related to waste treatment, it must explicitly add, as a specific prohibition, nondiscrimination in activities conducted in a facility built with Federal funds. This provision will clearly inform entities operating these facilities of their responsibilities with respect to Title VI.

**Finding:** EPA's nondiscrimination regulations also do not address sufficiently the States' obligations for State continuing programs.[211]

**Recommendation:** EPA must include some requirements for State continuing programs. At a minimum, the Agency must require that States develop Title VI compliance programs and that they submit methods of administration to EPA. However, these provisions also should impose data collection and reporting requirements, such as the submission of annual reports indicating the numbers of complaints investigated and compliance reviews performed. These provisions will enable EPA to ensure adequately that all of its federally funded programs operate in compliance with Title VI, and that EPA will conduct effective oversight and monitoring of States' Title VI enforcement activities. EPA also should distinguish State continuing programs from other federally assisted programs in a separate appendix or in a catalog, brochure, or pamphlet. This separate listing will highlight those programs in which State or local agencies have responsibility for enforcing Title VI and assessing their Title VI compliance efforts, and in which EPA has responsibilities to provide oversight and monitoring.

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[209] *See* p. 427.

[210] *See* p. 427.

[211] *See* p. 427.

### Guidelines

**Finding:** Although the Department of Justice's coordination regulations require each agency to publish Title VI guidelines for each type of Federal assistance program under its jurisdiction, EPA does not have adequate guidelines for its Title VI program.[212] In addition, EPA has failed to issue guidelines that explain the implications of the Civil Rights Restoration Act of 1987 on Title VI's coverage with respect to each type of EPA financially assisted program. These deficiencies are of concern to the Commission because recipients, applicants, actual and potential beneficiaries, and the public generally will not have an adequate means of understanding how Title VI relates to each type of EPA-funded program.

**Recommendation:** EPA must issue guidelines for each type of Federal financial assistance program under its jurisdiction. These guidelines should address the following issues or areas:

1) Since the Civil Rights Restoration Act of 1987 has clarified that Title VI's prohibition of discrimination applies to the entire State or local agency or public or private institution, EPA should publish guidelines that illustrate this application to each type of EPA-funded program. For example, in a block grant program, a State would receive the Federal funds based on a statutory formula and would redistribute the funds generally at its discretion. Title VI's coverage with respect to block-grant programs would extend to the State agency receiving and disbursing the funds, the subrecipient State or local agency or institution receiving some or all of those funds, the entity administering the program on the local level, and any facility built with or supported by those program funds. Title VI's nondiscrimination provisions would apply to the work forces within each of these agencies, institutions, or facilities; the program applicants or participants, such as municipalities or communities applying for pollution prevention funds; and the potential and actual beneficiaries, such as the residents of those municipalities and communities. For a technical assistance grant awarded to a specific community group, Title VI would extend to the practices of that group in selecting technical advisors. Title VI also would apply to the individuals or entities advised or overlooked by the technical advisors.

2) EPA should issue program-specific guidance on methods of enforcement relating to each type of EPA-funded program.

3) EPA should issue guidelines that offer examples of prohibited practices in the context of the particular type of program. For example, the State revolving fund program assists in transitioning States to State and local financing of municipal wastewater treatment facilities. Prohibited practices apply to the State or local agencies involved in the project, such as the State agency that assigns the Federal funds to the municipalities, and to discriminatory processes for selecting a facility site and building the facility: a) the composition of the planning or advisory board that chooses the site; b) the opportunity for individuals to provide input on choosing a site or developing the facility; c) the location of the site if it impacts on a minority community; d) the choice of contractors and subcontractors to build the facility; and e) the employment of individuals within that facility.

4) EPA should provide guidance on the types of remedial actions available in response to Title VI violations or findings of noncompliance.

5) EPA also should issue guidelines on the nature of requirements relating to covered employment, data collection, complaints, and public information. For example, EPA's regulations prohibit employment discrimination both when the EPA-funded program's purpose is employment and when the employment discrimination denies beneficiaries benefits or subjects them to discrimination. EPA should use guidelines to make the distinction in these types of prohibited employment practices. OSWER's Superfund Technical Assistance Grants is a program in which the primary purpose is employment. Since these grants

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[212] *See* p. 428.

provide community groups with the funding to hire technical advisors, a prohibited employment practice under Title VI naturally would involve denying an individual a technical advisor position because of race, ethnicity, or national origin. However, a prohibited employment practice also could occur in a State project funded by a Superfund grant. The program purpose involves identifying and cleaning up hazardous waste sites, rather than providing employment. If the State agency running this program employs a work force consisting predominantly of one race, ethnicity, or national origin, the decisions and conduct of that work force could subject beneficiaries to discrimination. For example, if those employees identify hazardous waste sites and assign priorities for cleanup based on the race, ethnicity, or national origin primarily represented in those areas, the conduct would constitute a prohibited employment practice under Title VI.

**Finding:** EPA also has not issued guidelines on the relationship between its Title VI and environmental justice programs.[213] As a result, individuals or communities whose complaints involve both Title VI and environmental justice do not have guidance on the distinctions and implications of the two civil rights areas.

**Recommendation:** EPA should issue guidelines that address the nexus between Title VI and environmental justice. For example, the Agency must distinguish any different standards for finding cause under Title VI and with respect to environmental justice, if different standards exist.

### Policies

**Finding:** EPA's regulations on Title VI do not address the recent enactment of the Civil Rights Restoration Act of 1987.[214] However, regulatory provisions may not be the best tool to explain fully and clearly the implications of the act. For example, the legislative history of the act discusses the principle that an agency may terminate funds not only if discrimination is "pinpointed" to use of those funds, but also if the use is "infected" with discrimination elsewhere in the operation of the recipient. However, the meaning and distinctions between "pinpointing" and "infection" are unclear.

EPA has issued a policy with regard to fund termination which specifies that termination of all Federal assistance throughout an organization might be justifiable if the discrimination finding was egregious and systemic, and if the recipient was both unrepentant and unwilling to come into compliance. However, it was unclear to the Commission whether this policy was in place before or after enactment of the Civil Rights Restoration Act of 1987. Also, the policy does not address any differences between "pinpointing" and "infection."

**Recommendation:** EPA should issue policy statements supplementing provisions in its regulations that would address these Title VI developments. Through policies, EPA should clearly specify whether the existing fund termination policy reflects implications of the Civil Rights Restoration Act of 1987. The policies also should establish concrete, illustrated standards by which discrimination would reach the level of "egregious and systemic," or "pinpointing" and "infection" so that recipients, applicants, program participants, and beneficiaries gain a practical understanding.

**Finding:** EPA's policies on Title VI and environmental justice are either nonexistent or outdated.[215] A strong and active policy development program is necessary for developing effective Title VI and environmental justice programs, especially in light of the complexity of overlap between Title VI and environmental justice issues.

**Recommendation:** EPA should develop systematic programs for Title VI and environmental justice in which it utilizes its compliance review, complaint investigation, outreach and education, technical assistance, and data collection processes to identify issues and areas in need of clarification or guidance. From those sources and the knowledge of OCR, OGC, and the Office of

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[213] *See* p. 428.

[214] *See* p. 426.

[215] *See* p. 428.

Environmental Justice (OEJ) staffs, these staffs should issue policy statements to provide clarification and guidance. The policies should define and elaborate the standards for compliance with Title VI and Executive Order 12,898. These policy statements should provide the agency officials, as well as recipients, beneficiaries, and the general public with an understanding of the practical implications and intent of Title VI and Executive Order 12,898. They should clarify the overlap between Title VI and environmental issues so that recipients, applicants, program participants, and potential and actual beneficiaries understand their rights and responsibilities. These types of policies also will assist EPA's civil rights and environmental justice staffs to distinguish strictly Title VI claims, from environmental justice-Title VI claims and solely environmental justice issues. The policies also should inform these groups of new developments in Title VI and environmental justice.

### Procedures

**Finding:** EPA's regulations relating to Title VI contain basic procedures for compliance and enforcement activities. EPA has more detailed procedures for preaward reviews, complaint investigations, and postaward reviews.[216] However, the procedures for preaward reviews and complaint investigations have not been updated since 1984 and, consequently, may not reflect changes in EPA-funded programs or the creation of new programs.

**Recommendation:** EPA should develop a comprehensive and detailed procedures manual that provides step-by-step guidance in all areas of the Title VI and environmental justice programs: a) performing compliance reviews; b) conducting complaint investigations; c) resolving complaints or noncompliance; d) instituting administrative or judicial proceedings; e) affording remedies; f) collecting and analyzing data; and g) providing staff training, outreach, education, and technical assistance. These procedures should distinguish between compliance and enforcement activities conducted by EPA's OCR and oversight, monitoring, and performance evaluation efforts performed by OCR on the State agencies that have Title VI and environmental justice enforcement programs. In particular, the instructions on compliance reviews and complaint investigations should specify the types of individuals to contact and the types of data to collect. These sections and the section on data collection and analysis should identify factors that civil rights enforcement staff should consider in assessing noncompliance and discrimination under Title VI. EPA also should tailor the procedural guidance to the types of programs it funds.

EPA also must develop procedures that EPA staff should follow to determine if discrimination exists in EPA programs. This is particularly important because EPA provides assistance primarily to programs that serve whole communities rather than individuals, which complicates the process of identifying discrimination. Consequently, EPA should establish procedures that examine the impact of EPA programs on the communities served, surrounding communities, and the general public. For example, EPA compliance reviews may involve reviewing public hearing records on the selection of sites for program facilities. In addition, EPA should collect demographic data on its recipients, beneficiaries, and affected communities that will assist EPA in determining compliance with Title VI. EPA also should develop procedures specifically for programs, such as loan programs, where discrimination may occur against individual applicants, program participants, or beneficiaries.

**Finding:** Although OCR has received new staff to accommodate the development of the environmental justice program,[217] OCR has not yet developed specific procedures for assessing environmental justice risks in compliance activities and compliant investigations. OCR analyzes environmental justice-Title VI compliance efforts and complaints using Title VI procedures.

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[216] *See* p. 428.

[217] *See* p. 428.

**Recommendation:** OCR should develop procedures that will assist its headquarters and regional staff in evaluating environmental justice risks in compliance activities and complaint investigations.

**Finding:** EPA maintains that the assortment of pollutants necessitates a case-by-case assessment, and it is considering a national assessment of the overall aggregate effects posed by environmental pollution. According to EPA, a compilation of these data will facilitate the identification of individual exposure profiles to a variety of pollutants.[218] This assessment may enable EPA to determine whether there are disparate effects of pollution loadings on different populations.

**Recommendation:** EPA should proceed with this national level assessment study. EPA should store this data on a database system that will facilitate long-term tracking of individual exposure profiles and variations in, or gradual disappearances of, any existing disparate effects, with the implementation of new EPA-funded programs or strategies to correct these effects.

## Process of Title VI Enforcement

### Preaward Reviews

**Finding:** EPA's Preaward Compliance Review Report form requests a moderate amount of useful information in assessing the applicant's existing and potential compliance with Title VI.[219] This information includes a description of the proposed project or program, any pending discrimination complaints against the applicant, any compliance reviews performed on the applicant by other Federal agencies, and the majority and minority populations to be served by the proposed project or program in comparison to their representation in the affected community and those populations served by existing projects or programs. Although EPA modified this form to apply to all EPA grant recipients, OCR conducts preaward desk-audit reviews for only the State revolving fund program. In addition, the number of preaward reviews which OCR performs has declined substantially over time.

**Recommendation:** Pursuant to DOJ's coordination regulations, OCR must ensure that all of its applicants and recipients of Federal funds provide assurances of Title VI compliance prior to receiving those funds. Beyond that limited type of review, OCR continue preaward reviews of the State revolving fund program applicants and recipients. It also should distribute the preaward compliance review report form to all grant applicants and recipients so that it extends its reviews to all EPA-funded programs. OCR should tailor the report forms to obtain the type of information necessary for assessing each type of EPA-funded program. If the preaward review report forms do not provide adequate information to make a determination on compliance or noncompliance with Title VI, OCR should request additional information as necessary. OCR should use the information from the preaward process to target applicants and recipients for technical assistance or onsite compliance reviews.

The Commission concurs with the Department of Justice that preaward reviews, both desk audit and on site, are essential to an effective Title VI enforcement program and, therefore, OCR should conduct them on all EPA program applicants and recipients. However, the Commission recognizes the budget and staffing limitations of OCR. It realizes that, with continuing emphasis on downsizing and restructuring of the Federal Government and maintaining fiscal responsibility, OCR may be unable to acquire additional staff to strengthen fully all aspects of EPA's Title VI implementation, compliance, and enforcement program. The Commission also understands that a lengthy preaward process will delay program benefits and, in effect, adversely impact on ultimate beneficiaries. In light of these factors, the Commission recommends some alternative strategies that will promote a meaningful and efficient preaward process on as many applicants and recipients as possible, eliminating reliance on cursory preaward reviews. These strategies should serve only as a secondary alternative to the optimal preaward compliance review process described above. Although this alternative may not be the most effective at ensuring full enforcement of Title VI, it should allow agencies to have some type of meaningful preaward review mechanism without critically impacting on Title VI enforcement. (See pp. 429–30 of this chapter.)

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[218] *See* p. 428.

[219] *See* pp. 429–30.

### Postaward Desk-Audit and Onsite Compliance Reviews

**Finding:** OCR has not performed any postaward desk-audit reviews since at least 1988.[220] However, through its External Compliance Review Pilot Program, OCR has developed a postaward questionnaire that will assist in determining the types of information that State agencies participating in the State revolving fund program should submit.[221] OCR has not performed any postaward onsite compliance reviews during the last 5 years. In its Environmental Justice Task Force report, OSWER recognized the need for periodic review of State programs to ensure compliance with Title VI and suggested that OSWER may finance OCR-conducted postaward reviews.

**Recommendation:** OCR should require periodic submissions of compliance reports by recipients. Where appropriate, OCR should conduct onsite compliance reviews of a representative number of major recipients on a periodic basis. OCR should use the onsite reviews as opportunities to provide education and technical assistance to recipients. OCR should reduce the results of its postaward compliance reviews to writing, include findings and recommendations for the recipient, and specify the recipient's compliance status. If strengthening OCR's efforts in other aspects of its Title VI enforcement program limits the availability of budgetary resources for postaward reviews, OCR should considering developing programs in conjunction with the program offices, such as OSWER, who will assist in financing the postaward review process.

### Complaint Investigations

**Finding:** In the past, EPA has received few Title VI complaints and investigated even fewer of them. It has confronted an increasing backlog of complaints relating to its federally assisted programs, and over the past several years, it has managed to complete only one complaint investigation each year.[222] However, the environmental justice initiative has led to an increase of Title VI complaints, and the EPA compensated for that increase by hiring additional staff for OCR. OCR has created teams of complaint investigators to handle the complaint caseload, and the staff is creating investigative plans for use in both conciliation conferences and case investigations.

**Recommendation:** EPA should develop a comprehensive complaint investigations process. That process should begin with a detailed intake mechanism to screen frivolous complaints from legitimate ones and, ultimately, conserve resources.

For State continuing programs in which State agencies receive and investigate complaints about subrecipients, EPA should require that these State agencies submit a written report on each complaint and its investigation. This requirement will facilitate OCR's oversight and monitoring of States' compliance and enforcement efforts and the overall effectiveness of EPA's Title VI enforcement program.

### Deficiencies, Remedies, and Sanctions

**Finding:** OCR has found few instances of noncompliance with Title VI. It generally resolves findings of noncompliance through voluntary compliance efforts and has not negotiated remedies or imposed sanctions in recent years. With the development of the environmental justice program, new options are available as sanctions that do not involve denial, suspension, deferral, or termination of Federal funds. For example, OSWER indicated that it has the authority to withhold a permit from an applicant in noncompliance with Title VI as long as the noncompliance is related to the protection of human health and the environment.[223] It also suggested in its Environmental Justice Task Force report some interim strategies for ensuring compliance, such as requiring risk assessments and using early baseline health evaluations.

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[220] *See* p. 430.

[221] *See* p. 430.

[222] *See* pp. 430–31.

**Recommendation:** OCR's compliance review process and complaint investigations should focus on identifying not only technical violations but also overt and subtle discriminatory practices. Once it identifies a deficiency or discriminatory practice, OCR should attempt to obtain voluntary compliance. However, OCR should also implement followup mechanisms to ensure that recipients and subrecipients fulfill their commitments to correct any deficiencies or discriminatory practices. If a recipient or subrecipient fails to do so, OCR should consider administrative avenues. It should obtain suggestions from EPA's program offices, such as those provided by OSWER, on creative interim strategies for ensuring compliance, and it should consider working with the program offices in implementing those strategies. For example, it should work with OSWER and obtain temporary withholding of an applicant's permit until the applicant corrects the noncompliance with Title VI. Other administrative avenues include consultation with or assistance from another Federal agency or State or local agency having nondiscrimination enforcement authority, bypassing the central agency applicant if that agency is in noncompliance, or bypassing all noncomplying non-Federal agencies to provide assistance directly to the ultimate beneficiaries.

If the recipient continues its discriminatory practices or fails to comply with Title VI, after an appropriate administrative hearing, OCR should consider referring the matter to the Administrator for suspension, denial, deferral, or termination of Federal funds. The Commission recognizes that these funding-related sanctions can adversely affect beneficiaries when the federally funded program already is in place. The Commission maintains that even the threat of these sanctions is an effective means of securing the compliance of recipients in continuing noncompliance.

### Outreach, Education, and Technical Assistance

**Finding:** EPA has made some efforts to provide outreach, education, and technical assistance on Title VI to recipients, State and local agency staff, community groups, and the public generally. EPA is active in conducting outreach, education, and technical assistance programs for environmental justice.[224] The Interagency Working Group, under the mandate of Executive Order 12,898, holds public meetings for the purpose of factfinding, receiving public comments, and conducting inquiries relating to environmental justice issues, and it prepares for public review a summary of the issues raised. To facilitate greater public involvement in the hazardous waste treatment process, EPA's Assistant Administrator encourages the regional administrators to initiate EPA-permitting activities that assure participation by segments of the population, including those with limited English proficiency. OEJ provides training to headquarters and regional staff on environmental justice issues and grants for educational programs and assistance to community groups. OEJ also has conducted outreach and education activities at conferences and colleges and for community organizations and businesses. OEJ maintains a toll-free Environmental Justice Citizens Hotline that receives complaints, inquiries, requests for counseling, and information from citizens on environmental justice issues and other environmental concerns, and it issues an annual report highlighting achievements in environmental justice. Furthermore, OEJ developed a small grants program funded in FY 1994 with $500,000, and, for FY 1995, OEJ acquired a congressional add-on fund of $3 million for outreach and education.

EPA's environmental justice initiative naturally has had incidental positive improvements on outreach, education, and technical assistance with respect to environmental justice-Title VI issues. However, these improvements have not added to the overall Title VI outreach, education, and technical assistance efforts.

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[223] *See* p. 432.

[224] *See* p. 433.

**Recommendation:** EPA should strengthen its Title VI outreach, education, and technical assistance programs based on the Agency's exemplary efforts in environmental justice. EPA must create outreach, education, and technical assistance programs tailored to Title VI. These programs should make available to the public Title VI regulations and guidelines. They should require the display of posters stating the recipients' nondiscrimination policy and compliance with Title VI. They also should require dissemination of information, through media or brochures, explaining program-specific types of discriminatory practices that Title VI prohibits, procedures for filing complaints, and the distinctions between Title VI and environmental justice. This information should be available in Spanish and other languages as needed depending on the communities or areas potentially or actually affected by EPA programs. Beyond these requirements, OCR should actively interact with recipients, State and local agency staffs, community groups, businesses, and the public generally in a fashion similar to OEJ. For example, through pre- and postaward desk-audit reviews, OCR should identify local areas or recipients in need of education and technical assistance. During onsite reviews or complaint investigations of recipients in those local areas, OCR should consider conducting interviews or meetings with community groups to facilitate outreach and education, in addition to providing technical assistance to that recipient. Similar to OEJ, OCR should provide grants to community groups supporting Title VI outreach, education, and technical assistance efforts, and it should conduct outreach and education activities at conferences and colleges and for local businesses. OCR should establish a hotline, similar to the Environmental Justice Citizens Hotline, that receives Title VI complaints, inquiries, requests for counseling, and information from citizens on Title VI issues. Furthermore, OCR should develop a grants program specifically supporting recipients' efforts at performing Title VI outreach and education.

## Oversight of Continuing State Programs

**Finding:** OCR's effort at conducting oversight, coordination, or monitoring of State continuing programs has been extremely limited. EPA has no regulations, guidelines, policies, or procedures relating to these types of programs. OCR conducts no performance evaluations or reviews of State agencies, and it does not require those agencies to submit methods of administration, compliance reports, or self-assessment reports on their Title VI compliance and enforcement efforts.[225]

**Recommendation:** At a minimum, EPA must add to its regulations provisions requiring States' submissions of methods of administration and statements of assurances. OCR must issue specific guidelines that inform State and local agencies of what these methods of administration should entail and how to create sufficient accountability for the actions of recipients and subrecipients in complying with Title VI. OCR also must establish a review process to ensure receipt of these methods of administration and statements of assurances. Further, OCR should implement more detailed oversight and monitoring mechanisms. OCR should develop a process to ensure that State and local primary recipients are collecting and maintaining data on their potential and actual subrecipients and subgrantees, beneficiaries, and affected communities. OCR should ensure that State and local primary recipients conduct complaint investigations and compliance reviews of subrecipients and subgrantees. For example, OCR should require States to provide annual reports or self-assessment reports on their progress in Title VI compliance and enforcement. Based on reviews of these reports, OCR would identify those State and local agencies in need of onsite evaluation or technical assistance.

**Finding:** Similarly, EPA has no oversight procedures specifically for State continuing programs and States' efforts in enforcing environmental justice. EPA has received environmental justice assurances but only from two States on a voluntary basis, and it is only considering use of these assurances on a nationwide basis.

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[225] *See* p. 435.

**Recommendation:** EPA should require environmental justice assurances from all States with State continuing programs. However, its oversight of State continuing programs with respect to environmental justice should involve more than a routine check for the receipt of those assurances. OCR also should place reporting requirements on States, such as submission to OCR of information on complaint investigations involving environmental justice and annual reports on State activities in environmental justice.

## Staff Training

**Finding:** OCR does not have an adequate staff training program for Title VI compliance and enforcement or for issues related to environmental justice. It has not conducted regional training since 1991. OEJ has provided awareness training to EPA headquarters and regional office staff on environmental justice issues.[226] However, there was no indication that OCR staff received specific training on identifying environmental justice risks when conducting compliance reviews and complaint investigations. The lack of a staff training program impedes OCR's ability to enforce Title VI and environmental justice efficiently and effectively. A strong staff training program will instruct staff on how to perform thorough preaward and postaward reviews and complaint investigations. It also will strengthen staff members' abilities to identify relevant information for data collection and improve their analytical skills.

**Recommendation:** EPA must institute a comprehensive staff training program for OCR with respect to Title VI enforcement. This training should inform staff members of developments in Title VI law and environmental justice. It should provide instruction on conducting thorough compliance reviews, complaint investigations, and performance evaluations of State and local agencies with Title VI enforcement responsibility. In addition to this instruction, the training should concentrate on improving skills in statistical analysis, negotiation and dispute resolution strategies, and computer literacy.

## Data Collection and Analysis

**Finding:** OCR currently uses only the preaward compliance review report form to collect data on Title VI. However, through EPA's External Compliance Review Pilot Program, OCR will determine the types of information it should collect from State environmental agencies. Once this information is collected, OCR will be able to expand its data collection and analysis process.

**Recommendation:** OCR should ensure that it requires all types of EPA-funded program recipients to complete the preaward compliance review report forms. The applicants' prior compliance records, pending discrimination complaints, and compliance reviews performed on them by other Federal agencies are universally applicable and important in assessing all program applicants. OCR should compile this information in a database and maintain continuing histories of compliance on all its program recipients.

However, for other information, OCR should tailor the forms to the different types of federally assisted programs so that OCR will receive the necessary data to make thorough assessments about recipients' compliance with Title VI and environmental justice. For example, for its State revolving fund program, which assists State financing of municipal wastewater treatment facilities, OCR should continue to require information that supports an impact analysis of the proposed project on the potential and actual affected communities and populations to be served. Postaward data collection should include compilation and assessments of the racial, ethnic, or national origin representations of the planning or advisory board that supervises the construction process, the contractor's work force that constructs the facilities, as well as the work force that runs the facilities once they are operational. Preaward data collection of the pollution prevention grants program should include assessments of the State or local agency's past compliance with Title VI and environmental justice through its pollution prevention efforts. Postaward data collection should include an assessment of the individuals or communities that the program strategies have reached, whether literature on the programs was made available to all types of individuals with regard to race, ethnicity, and national origin, and whether this literature was available in non-English languages when necessary to reach particular populations in an affected community.

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[226] *See* pp. 436–37.

**Finding:** OCR generally considers only racial and ethnic data as part of its Title VI program. However, it obtains both racial/ethnic data and socioeconomic demographic data for environmental justice issues. OEJ efforts at data collection and analysis are more in depth. For example, OEJ currently is conducting the largest geographic-specific public health study ever attempted to examine the relationship between hazardous environmental exposure and communities at greatest risk. OEJ, in conjunction with the Center for Disease Control and Prevention, State health departments, and historically black colleges, is working to reduce and prevent environmental hazards from disproportionately and adversely affected minority and low-income populations along highly industrialized areas of the Mississippi. Because minorities are disproportionately poorer than whites by population percentages, OCR has resources and data collection processes already available to it, through OEJ, to assist in identifying instances of discrimination based on race, color, or national origin. However, there is no indication that OCR uses these statistical data or the results from the study to assist in the Title VI enforcement program.

**Recommendation:** OCR should use OEJ's activities in data collection and analysis as a model for developing a sound civil rights enforcement data collection and analysis program that promotes Title VI enforcement. Furthermore, since OEJ already is conducting studies that identify socioeconomic demographic as well as racial and ethnic data, OCR should coordinate its data analysis efforts with OEJ to facilitate effective strategies for identifying potential instances of discrimination with respect to Title VI.

## Civil Rights Implementation Plans

**Finding:** EPA's Civil Rights Implementation Plans do not serve as adequate informational, planning, or reporting tools. The plans provide little information about OCR's approach to civil rights enforcement in federally assisted programs to facilitate a complete understanding. The goals are general and ambitious given OCR's limited resources. They are unrelated to OCR's budget, staffing, and resources, or its projected workload, indicating limited use of the documents for practical planning. The plans gave no indication over time that OCR was achieving past goals and objectives.[227]

**Recommendation:** EPA must engage in a serious planning effort with respect to its civil rights enforcement program related to federally assisted programs, regardless of whether it reduces its efforts into a Civil Rights Implementation Plan or some other strategic planning document. However, for the purposes of meeting the requirements imposed by DOJ's coordination regulations, EPA must submit a Title VI or other civil rights implementation and enforcement plan to the Department of Justice. With the new responsibilities created by the Agency's environmental justice program and the addition of staff to OCR, EPA should assess its current activity with respect to Title VI, both as it relates to environmental justice and as a wholly independent civil rights enforcement program. EPA should ensure that the description of its enforcement programs will provide a clear understanding to the public of the Agency's Title VI and environmental justice compliance and enforcement processes. For example, EPA should identify the methods it uses for choosing recipients for compliance reviews and the timetables OCR or OECA establishes for performing these reviews. It should describe procedures for handling complaints, especially when many offices, such as OCR, OGC, OEJ, and OECA, are involved. It should discuss staff allocations to compliance and enforcement functions, so that the Department of Justice and the public will acquire a clear picture of the existing structure of civil rights enforcement for federally assisted programs in EPA and areas of concentration.

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[227] *See* p. 437.

EPA's long-range policy goals should be specific and should provide the overall framework for the Agency's planning effort. However, EPA should include strategies to meet these long-range goals for each type of activity in its Title VI and environment justice enforcement programs, specifically pre- and postaward reviews, complaint investigations, outreach, education, technical assistance, staff training, data collection and analysis, and oversight of continuing State programs. EPA should develop these strategies with recognition and consideration of the available resources and staff and current and projected workload.

Finally, EPA should conduct an annual assessment of achievement of these goals and objectives and a reevaluation of its Title VI and environmental justice enforcement programs. This process will allow the Agency to adjust its civil rights enforcement programs to changes and needs.

Chapter 12

# The Small Business Administration

In fiscal year 1993, the Small Business Administration (SBA) provided approximately $7 billion in Federal financial assistance to more than 80,000 recipients through 14 programs.[1] Title VI specifically excludes from coverage any programs involving contracts of guaranty.[2] Because the SBA primarily gives Federal financial assistance in the form of loan guaranties, most of this Federal financial assistance is not subject to Title VI. However, the SBA offers some forms of assistance that are subject to Title VI.

## The SBA's Federal Financial Assistance Programs

SBA-administered loan programs covered by Title VI include the Vietnam and disabled veterans loan program, the handicapped assistance loan program, and the minority business development program (section 8(a)), which is designed to assist businesses owned by socially and economically disadvantaged persons. The SBA also offers disaster assistance loans to aid victims of disasters declared by the President, the SBA Administrator, or the Secretary of Agriculture. SBA provides many of its loans to small businesses through development companies and through small business investment companies licensed by the SBA. These loans provide equity or long-term venture capital to small businesses.[3]

## Organization, Budget, Staffing, and Workload of the SBA's Civil Rights Function

### Organization

The Office of Equal Employment Opportunity and Civil Rights Compliance (OEEO&C) has primary responsibility for Title VI enforcement at the SBA. Until recently, OEEO&C was headed by a Director who reported to the Associate Deputy Administrator for Management and Administration[4] and was three levels removed from the SBA's Administrator. The Director was a member of SBA's Management Board, which is a group of senior managers who advise the Administrator on policy and budgetary matters.[5] Thus, the Director was given a forum for influencing the SBA's policy and budget decisions as they affected civil rights. However, depending on the workings of the board, membership may not have been sufficient for the Director to ensure integration of and emphasis on civil rights enforcement, and Title VI enforcement particularly, throughout SBA program operations and in administrative matters. Effective participation would have given the Director of OEEO&C the opportunity to participate actively in all phases of policy and budget development.

After the SBA's recent reorganization in 1994, the head of OEEO&C now reports directly to the

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[1] Small Business Administration, "Fiscal Year 1994 Civil Rights Implementation Plan," p. 31 (hereafter cited as SBA FY 1994 Implementation Plan).

[2] 42 U.S.C. § 2000d-1 (1988).

[3] SBA FY 1994 Implementation Plan, pp. 3–5.

[4] U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the Small Business Administration, Q. 20, p. 12 (hereafter cited as SBA Survey).

[5] Philip Lader, Administrator, U.S. Small Business Administration, letter to Mary Frances Berry, Chairperson, U.S. Commission on Civil Rights, DATE, p. 1 (hereafter cited as Lader letter).

SBA Administrator. The SBA also changed the title of the office head from Director, Office of Equal Employment Opportunity and Compliance, to Assistant Administrator for Equal Employment Opportunity and Civil Rights Compliance.[6] These changes should enhance the prominence of civil rights within the SBA. The SBA Administrator indicated that the organizational change is helpful because "it strengthens perceptions as to the importance SBA places on the integrity and independence of OEEO&C."[7]

OEEO&C consists of two offices, the Office of Equal Employment Opportunity, which oversees the SBA's internal civil rights responsibilities, such as Title VII, and the Office of Civil Rights Compliance (OCRC), which has responsibility for the SBA's external civil rights activities, including Title VI enforcement.[8] The division of civil rights functions between these offices enables OCRC staff to develop expertise in external civil rights laws, such as Title VI. Moreover, the organizational structure helps to ensure that internal civil rights enforcement activities do not overwhelm external civil rights enforcement. For example, if the Office of Equal Employment Opportunity receives an increasing number of Title VII complaints, the SBA is less likely to remove OCRC staff from its Title VI duties to address Title VII issues because of the separate roles of the two offices. However, OCRC does not assign any of its staff solely to Title VI enforcement; each staff member implements, monitors, and enforces all external civil rights policies and law.[9] Therefore, OCRC staff may have a general knowledge of all civil rights laws pertaining to Federal financial assistance in SBA programs, but not comprehensive knowledge of or expertise in Title VI.

In addition to its headquarters staff in Washington, D.C., OCRC has staff in central office duty stations in six regional cities: New York, Philadelphia, Atlanta, Chicago, Dallas, and San Francisco.[10] These central office duty personnel perform onsite reviews of SBA program offices and recipients, provide technical assistance, investigate complaints, and examine the status of all nominees for various SBA awards.[11]

In general, the SBA's operational and program offices do not have Title VI enforcement responsibilities. The contracting officers, who enter into and administer SBA contracts and process SBA grants and loans, only ensure that recipients and contracting parties have submitted required assurances of compliance with the nondiscrimination regulations. The project officers and program managers also ensure receipt of these assurances, and they refer all discrimination complaints to OCRC.[12]

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[6] George H. Robinson, Assistant Administrator for Equal Opportunity and Civil Rights Compliance, U.S. Small Business Administration, letter to Frederick D. Isler, Acting Assistant Staff Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, Oct. 21, 1994, p. 1 (hereafter cited as Robinson October 1994 letter).

[7] Lader letter, p. 1.

[8] In addition to Title VI, OCRC has responsibility for: the Equal Credit Opportunity Act of 1974, as amended, 15 U.S.C. §§ 1691–1691f (1988 & Supp. V 1993); regulation B, 12 C.F.R. 202 (1993); section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 (1988 & Supp. V 1993); Title VIII of the Civil Rights Act of 1968, as amended, 42 U.S.C. §§ 3601–3619, 3631 (1988 & Supp. V 1993); Title IX of the Education Amendments Act of 1972, 29 U.S.C. §§ 1681–1688 (1988); the Civil Rights Restoration Act of 1987, Pub. L. No. 100–259, 102 Stat. 28 (codified as amended in scattered sections of 42 U.S.C.); section 4(b) of the Small Business Act, 15 U.S.C. §§ 631–644 (1988 & Supp. V 1993); the Small Business Investment Act of 1958, Pub. L. No. 85–699, 72 Stat. 689 (codified as amended in scattered sections of 15 U.S.C.); the Age Discrimination Act of 1975, as amended, 42 U.S.C. §§ 6101–6107 (1988); the Hearing Aid Compatibility Act of 1988, 47 U.S.C. §§ 609–10 (1988); the Disaster Relief Act of 1974, Pub. L. No. 100–707, 102 Stat. 4689–4711 (1988) (codified as amended in scattered sections of 42 U.S.C.); and the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621–634 (1988 & Supp. V 1993).

[9] SBA Survey, Qs. 23, 37, pp. 13, 21.

[10] SBA FY 1994 Implementation Plan, pp. 5–6.

[11] SBA Survey, Q. 37, p. 21.

Two organizational units with Title VI responsibilities do not report to OEEO&C, the Office of General Law and the Office of Litigation, both in the Office of General Counsel. The Office of Litigation represents the SBA in any action filed against the agency, including those claiming discrimination. The Office of General Law provides legal support to OEEO&C.[13] The absence of legal support within OEEO&C impedes SBA's Title VI implementation and enforcement. Since OCRC does not have its own legal or policy support, it has been unable to complete planned revisions to its Title VI regulations and standard operating procedures. OEEO&C has relied on the Office of General Counsel to perform the revisions. However, to date, the SBA has not accomplished the revisions.[14] Given the complicated nature of Title VI and other civil rights statutes, OEEO&C cannot draft regulations effectively without internal legal support. OEEO&C staff demonstrated only a general knowledge of the legal foundations of their Title VI program,[15] knowledge that could be supplemented with an OEEO&C attorney-advisor specialized in civil rights laws and, in particular, the complexities of Title VI. By placing legal and policy support staff within its OEEO&C, SBA can update Title VI regulations and draft guidelines, procedures, and policy statements more efficiently and enhance its Title VI implementation and enforcement effort.

### Budget, Staffing, and Workload

Although OEEO&C's budget is earmarked in SBA's appropriation from Congress,[16] the budget does not specify separate amounts allocated to internal civil rights enforcement and external civil rights enforcement.[17] Over time, OEEO&C's nominal budget increased from $1.1 million in 1976, to nearly $2.4 million in 1993.[18] However, in real terms OEEO&C's budget declined between 1981 and 1988. It increased again in 1992, but did not reach the 1981 level, and decreased in 1993.[19] Thus, the SBA's civil rights budget in real terms remains below its 1981 budget.

The SBA could not provide estimates of its expenditures on civil rights enforcement in federally assisted or conducted programs generally, or on Title VI specifically.[20] Without a separate record of expenditures on various civil rights activities, such as complaint investigations and postaward reviews, the SBA cannot monitor whether it has enough resources to meet its existing Title VI responsibilities and whether its has funds to achieve particular Title VI program goals. A system for monitoring expenditures and resource allocation is especially helpful in justifying the need for existing or additional staff. For example, such a monitoring system could reveal an increased workload in external civil rights enforcement but inadequate resources to meet it. This information would substantiate the need to increase external civil rights staff size or, at least, maintain the current size instead of decreasing it.

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[12] Ibid., Q. 24, p. 14.

[13] Ibid., Q. 21, p. 12.

[14] *See* discussion below, p. 457.

[15] *See* discussion pp. 466–67.

[16] SBA Survey, Q. 29, p. 17.

[17] Ibid.

[18] Ibid., Q. 33, p. 18. *See also* table 12.1. In fiscal year 1993, the allocation for the operation of the Office of Equal Employment Opportunity and Compliance was $2,355,000. SBA FY 1994 Implementation Plan, p. 6.

[19] *See* table 12.1.

[20] SBA Survey, Q. 34, p. 19. According to SBA's FY 1994 Civil Rights Implementation Plan, funds are not designated for the coverage of any particular statute or Act. For example, monitoring and enforcement of section 504 federally conducted programs is covered by the same staff and budgetary allocation. SBA FY 1994 Implementation Plan, p. 6.

**TABLE 12.1**
**Small Business Administration's Civil Rights Budget and Staffing: 1976–1993**

| | 1976 | 1981 | 1984 | 1988 | 1992 | 1993 |
|---|---|---|---|---|---|---|
| Budget | | | | | | |
| Millions of $ | $1,101 | $1,891 | $1,815 | $1,862 | $2,425 | $2,367 |
| Millions of constant $ | $2,125 | $2,403 | $1,986 | $1,797 | $2,019 | $1,917 |
| Staff | 54 | 45 | 38 | 41 | 38 | 38 |

Source: U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the Small Business Administration, Q. 33, p. 18; Q. 35(c), p. 20. Note: Both the budget and staffing numbers include resources devoted to equal employment opportunity in addition to resources devoted to external civil rights enforcement. To calculate the constant-dollar figures, the nominal dollar amounts were adjusted using a price index for government services developed by the U.S. Department of Commerce, Bureau of Economic Analysis, as reported in President of the United States, *Economic Report of the President* (Superintendent of Documents: Washington, DC, 1995), table B–3, p. 279. The base year for the price index is 1987

As the SBA's civil rights budget decreased over time, its civil rights staff size declined also. The SBA's failure to monitor its civil rights expenditures and resource needs may have attributed to this decrease in civil rights staffing. OEEO&C's staffing decreased from 54 in 1976 to 38 in 1993.[21] As the total civil rights staff diminished, the number of civil rights staff devoted to external civil rights enforcement also declined. OCRC's staff decreased from 29.5 to 19.5 between 1976 and 1993.[22]

Currently, OCRC consists of 25 full-time, permanent employees, including 6 support staff and 19 professionals.[23] Two of these staff members, OCRC's chief and an equal opportunity specialist, are located in OCRC's headquarters office.[24]

OCRC's workload has increased as its civil rights staffing and budget have declined. The SBA attributed OCRC's increased workload over time to the passage of new civil rights laws.[25] The SBA reported that the increase in its civil rights responsibilities had not significantly affected its ability to enforce Title VI in a manner similar to the past.[26] However, it indicated that the lack of resources hampers an effective Title enforcement program.[27]

As noted above, the SBA's prior organizational structure placed OEEO&C's Director three levels removed from the SBA Administrator. This arrangement, as well as the SBA's failure to monitor civil rights expenditures and resource needs, could have attributed to OCRC's lack of adequate resources for Title VI implementation and enforcement. The SBA's recent reorganization, allowing OEEO&C's director to report directly to the Administrator, should permit OEEO&C's active involvement in budget and staffing decisions, especially in light of the current trend to downsize the Federal Government. Then, perhaps, OCRC will receive the resources necessary to ensure a more effective Title VI enforcement program.

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[21] SBA Survey, Q. 35, p. 20.

[22] Ibid.

[23] SBA FY 1994 Implementation Plan, p. 6.

[24] George H. Robinson, Assistant Administrator for Equal Employment Opportunity and Civil Rights Compliance, Small Business Administration, letter to Frederick D. Isler, Acting Assistant Staff Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, Aug. 17, 1994. The equal opportunity specialist who recently transferred into OCRC has no previous civil rights experience and is undergoing on-the-job training. Ibid.

[25] SBA Survey, Qs. 27, 28, p. 17.

[26] Ibid., Q. 28, p. 17. *See also* Lader letter, pp. 5–6.

[27] SBA Survey, Q. 82(b), p. 45. The SBA Administrator indicated, however, that "while more resources for the Title VI program would be helpful, absent an inability to meet our Title VI responsibilities, it is doubtful that the OEEO&C budget and staff can be increased." Lader letter, p. 6.

## Regulations, Guidelines, Policies, and Procedures

Given the limited nature of the SBA's Title VI enforcement responsibilities, the SBA's Title VI regulations and procedures are minimally adequate for its Title VI enforcement program. Nevertheless, its regulations suffer from some serious omissions. In addition, the SBA has not issued Title VI policy statements or guidelines.

### Regulations

The SBA has Title VI regulations[28] that the U.S. Department of Justice first approved in 1965.[29] The SBA's regulations comply with some of the requirements of the Department of Justice's coordination regulations. For example, they have an appendix listing the types of Federal financial assistance to which the regulations apply.[30] However, the SBA has not updated these regulations since 1985.[31] Therefore, the appendix may not be up to date, and the regulations do not reflect recent changes in Title VI. For example, the Civil Rights Restoration Act of 1987 clarified that Title VI's prohibition of discrimination in "programs or activities" applied to the entire agency or institution, if any part of that agency or institution received Federal funds.[32] The SBA's regulations only prohibit discrimination "under any financial assistance activities."[33] They do not specifically include SBA "programs" in the nondiscrimination provision, and they do not clarify whether the provision applies to an entire agency or institution or only the part receiving Federal funds. The SBA admitted a need to clarify in its regulations its authority to take actions, such as withholding financial assistance, when it finds recipients in noncompliance.[34] It has sought to add this clarification for the past 4 fiscal years. However, the Office of General Counsel has not yet begun planned revisions.[35] The SBA attributed this failure to the lack of priority which the Office of General Counsel has given to revising SBA's Title VI regulations and to the lack of personnel in that office.[36]

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[28] 13 C.F.R. Part 112 (1994). In addition to its Title VI regulations which are inapplicable to Federal loan guarantees, the SBA has broader nondiscrimination regulations at 13 C.F.R. § 112, which extend prohibitions similar to those in Title VI to recipients of SBA loan guarantees. 13 C.F.R. §§ 112.3–112.6 (1994).

[29] SBA Survey, Q. 2, p. 5.

[30] 13 C.F.R. Part 12, Appendix A (1994).

[31] *See* 13 C.F.R. § 112 (1994). Under a "Streamlining Initiative" announced in March 1995, the SBA's Office of General Counsel is conducting a comprehensive review for possible revision of all of the SBA's regulations and standard operating procedures, including the Title VI regulations. Lader letter, p. 2.

[32] Pub. L. No. 100–259, 102 Stat. 28 (codified and amended at 20 U.S.C. §§ 1681note, 1687, 1687note, 1688, 1688note (1988); 29 U.S.C. §§ 706, 794 (1988 & Supp. V 1993); 42 U.S.C. §§ 2000d-4a, 6107 (1988)).

[33] 13 C.F.R. § 112.1 (1994).

Moreover, the SBA's regulations are stronger in some respects than the Department of Education's (DOEd), which the Department of Justice designated as model regulations.[37] For example, like DOEd's regulations, they prohibit employment discrimination in two instances: when the primary objective of the assistance is providing employment or when the employment practice leads to discrimination within the assisted program even if the primary purpose of the assistance is not providing employment.[38] The SBA's regulations, however, go beyond these prohibitions. They also include a blanket prohibition of any discriminatory employment practice by small business concerns and development companies that apply for or receive any financial assistance because "[s]uch assistance is deemed to have as a primary objective the providing of employment."[39]

The SBA's regulations also present the second instance of employment discrimination with more clarity than DOEd's regulations. DOEd's regulations prohibit an employment practice that *causes discrimination* against beneficiaries or potential beneficiaries.[40] The SBA's regulations specify that there is employment discrimination if the employment practice *excludes an individual in participation in, denies them benefits of, or subjects them to discrimination under the program*.[41] Unlike DOEd's provision, this language provides some indication of how the employment practice may harm an individual. Moreover, rather than limiting the provision to "beneficiaries or potential beneficiaries," the SBA's regulations protect an "individual" from discrimination, which could

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[34] SBA Survey, Q. 9, p. 7.

[35] *See* Small Business Administration, "FY 1990 Civil Rights Implementation Plan," pp. 22, 26 (hereafter cited as SBA FY 1990 Implementation Plan); Small Business Administration, "FY 1991 Civil Rights Implementation Plan," pp. 22, 26 (hereafter cited as SBA FY 1991 Implementation Plan); Small Business Administration, "FY 1992 Civil Rights Implementation Plan," pp. 22, 26 (hereafter cited as SBA FY 1992 Implementation Plan); SBA FY 1993 Implementation Plan, pp. 22, 26; SBA FY 1994 Implementation Plan, pp. 21, 27.

[36] SBA Survey, Q. 82(b), p. 46.
SBA's General Counsel explained to the Commission:
"The regulatory change that OEEO&C officials requested was simply a procedural change to delete the language contained in § 112.11(b) having to do with our Office of Hearings and Appeals because they have never utilized its provisions, do not believe it is of any practical benefit to SBA's Title VI enforcement efforts, and believe it merely adds confusion to our regulations. All applicants for SBA financial assistance sign assurances that they will comply with Part 112, if Federal financial assistance is granted, as a routine part of the application process. Thus, as a practical matter, there are no instances where financial assistance is extended and such assurances have not already been provided. In light of these factors, this task received low priority."
He indicated that the Office of General Counsel would incorporate the OEEO&C officials' suggested regulatory change when it made other changes to SBA's Title VI regulations. John T. Spotila, General Counsel, Small Business Administration, letter to Frederick D. Isler, Acting Assistant Staff Director for Civil Rights Evaluation, U.S. Commission on Civil Rights, July 20, 1994, pp. 2–3 (hereafter cited as Spotila letter). *See also* SBA Survey, Q. 9, p. 7. Furthermore, SBA noted, "Given the low priority placed on the matter by OEEO&C itself, this matter received low priority from the Office of General Counsel." Lader letter, p. 2.

[37] 34 C.F.R. Part 100 (1993).

[38] 34 C.F.R. § 100.3(c)(3) (1994).

[39] 13 C.F.R. § 112.4 (1994).

[40] 34 C.F.R. § 100.3(b)(6) (1994) (emphasis added).

[41] 13 C.F.R. § 112.4 (1994) (emphasis added).

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include a beneficiary, applicant, or any other individual affected by the program. The importance of clarity is paramount because it helps to prevent courts from misinterpreting regulatory language and because it enables program recipients and beneficiaries to better understand their responsibilities and rights under the Title VI regulations.

The SBA's regulations are more abbreviated in form and different than DOEd's in two important respects.[42] First, they list only some of the specific prohibited discriminatory actions in DOEd's regulations. Like DOEd's regulations, the SBA proscribes all the discriminatory practices listed in the Commission's 1966 *Compliance Officer's Manual* which the Department of Justice applies as a standard for regulation content. However, the SBA's regulations do not prohibit denying "an individual an opportunity to participate in the program through the provision of services or otherwise afford[ing] him an opportunity to do so which is different from that afforded others under the program."[43] Nor do they prohibit denying "a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program."[44] The exclusion of these specific practices is problematic. For example, under the small business development centers program, the SBA might provide a project grant to a college or university to provide management counseling, training, and technical assistance to a small business community. If that college or university excludes an individual from the planning or advisory board that designs the program because of race, ethnicity, or national origin, the individual may not have recourse under Title VI, if this practice is not specifically prohibited in the SBA's regulations.

### Guidelines, Policies, and Procedures

The SBA has not published Title VI guidelines for its federally assisted programs, as required by the U.S. Department of Justice's coordination regulations.[45] It has provided a section called "[i]llustrative applications" in its Title VI regulations that attempts to explain employment discrimination, discrimination in providing financial assistance, and discrimination in accommodations or services.[46] However, these illustrative applications do not provide concrete examples of these types of discrimination. Title VI guidelines could serve this purpose.

The SBA also has not issued policy statements on Title VI. The need for policy guidance is imperative. For example, the Civil Rights Restoration Act of 1987 clarified whether an agency may terminate funds to the entire institution if only one part or program within the institution is found in noncompliance with Title VI. The act restored the principle that an agency may terminate funds not only if discrimination is "pinpointed" to the use of those funds, but also if the use is "infected" with discrimination elsewhere in the operation of the recipient.[47] The SBA's regulations allow termination of funds as a procedure for effecting compliance with Title VI. However, they do not reflect this change in Title VI. A policy statement could address the present status of the law on this issue and clearly define the agency's position on its termination authority.

Although the SBA has produced no guidelines or policy statements on Title VI, it does have comprehensive procedures for all of its nondiscrimination regulations, Federal civil rights statutes, and Executive orders.[48] The SBA's procedures generally describe the SBA's civil rights compliance program under Title VI of the Civil Rights Act of 1964 and other civil rights statutes.[49] They also describe the methods used for monitoring recipients and conducting compliance reviews and onsite investigations of recipients, SBA program offices, and officials charged with discrimination by members of the public.[50] These discussions are thorough and commendable; they have sections tailored to the type and size of businesses and one section devoted to reviews of program offices. The procedures cover the following areas:

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[42] *See* chapter 5 for a discussion of DOE's regulations.

[43] *See* DOE's regulations at 34 C.F.R. § 100.3(b)(1)(vi) (1994).

[44] *Id.* at § 100.3(b)(1)(vii).

[45] 28 C.F.R. § 42.404(a) (1994).

[46] 13 C.F.R. § 112.7(a)-(d) (1994).

[47] U.S. Congress, Senate, Committee on Labor and Human Resources, *Civil Rights Restoration Act of 1987*, 100th Cong., 2d sess., S. Rep. No. 64, p. 20, *reprinted in* 1988 U.S.C.C.A.N. 3, 22. *See also* Board of Pub. Instruction v. Finch, 414 F.2d 1068 (5th Cir. 1969). *See* chapter 2 for further discussion.

- basic civil rights compliance procedures;
- interagency civil rights compliance coordination and delegations;
- public dissemination of civil rights information;
- civil rights data and information collection;
- civil rights compliance reviews;
- complaints of discrimination;
- investigations;
- procedures for achieving voluntary compliance;
- civil rights technical assistance; and
- record management for civil rights compliance.[51]

The SBA issued these procedures in 1984. It recently completed drafting revised procedures.[52] SBA staff indicated that the draft procedures are much more detailed than the current procedures.[53] However, the revised procedures have yet to be finalized.[54] OCRC staff explained that approval of the draft procedures had been delayed by the SBA's Office of General Counsel.[55] However, the General Counsel responded that his office submitted its comments on the proposed standard office procedures to OEEO&C in 1992 for further consideration and has not received the draft procedures back from OEEO&C for legal review.[56] Regardless of the source of this delay, the need for legal support staff within OEEO&C is apparent. OEEO&C could ensure completion and adoption of revised procedures more efficiently if it had legal expertise within the office to provide comment on the procedures without complete reliance on an independent office for legal support.

In October 1994, OEEO&C provided the Commission with a draft copy of its revised Standard Operating Procedures.[57] The revised version contains many improvements to the existing procedures. For example, the draft expands requirements for data collection, an area of the SBA's Title VI program in need of much improvement.[58] The revised procedures require program offices to collect data to enforce nondiscrimination, including data pertaining to applicants, a provision not included in the existing procedures. In addition, the revised procedures expand the existing requirement that recipients collect data to enforce nondiscrimination by imposing the requirement on SBA affiliates and lenders also.[59] These provisions are significant because the SBA currently does not perform preaward reviews. With such data available, the SBA may be able to perform preaward desk-audit reviews.

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[48] Small Business Administration, Office of Equal Employment Opportunity and Compliance, *Civil Rights Compliance*, Small Business Administration Standard Operating Procedure, Section 90, No. 30, Rev. 2, July 20, 1984 (hereafter cited as SBA Standard Operating Procedure).

[49] Ibid., p. 1. Other civil rights statutes covered by the procedures include: Title VIII of the Civil Rights Act of 1968, as amended, 42 U.S.C. §§ 3601–3619, 3631 (1988 & Supp. V 1993); the Small Business Investment Act of 1958, Pub. L. No. 85–699, 72 Stat. 689 (codified as amended in scattered sections of 15 U.S.C.); the Equal Employment Act of 1972, Pub. L. No. 92–261, 86 Stat. 103 (codified as amended in scattered sections of 5 U.S.C., 42 U.S.C.); the Equal Credit Opportunity Act of 1975; and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988 & Supp. V 1993).

[50] SBA Standard Operating Procedure, p. 9.

[51] Ibid., pp. 1–7.

[52] SBA FY 1994 Implementation Plan, p. 27.

[53] Dockett interview, p. 3.

[54] Robinson October 1994 letter, p. 1.

[55] Dockett interview, p. 3.

[56] Spotila letter, p. 3. SBA indicated that a recent draft of the standard operating procedures has now been submitted to the Office of General Counsel. Lader letter, p. 2.

[57] Robinson October 1994 letter, attachment.

## The SBA's Title VI Enforcement Process

Despite the existence of a comprehensive procedures manual, the SBA's Title VI enforcement program is very limited. The SBA's Title VI enforcement process focuses primarily on postaward onsite compliance reviews. Although the agency completes a large number of these reviews each year, it does very little in most other enforcement areas.

### Preaward Reviews

In describing its preaward evaluation process, the SBA noted that each applicant for Federal financial assistance must sign assurance of nondiscrimination forms.[60] The contracting and project officers and the program managers, rather than OCRC, ensure that applicants submit these assurances.[61]

The SBA indicated that it conducts onsite preaward reviews when: 1) an applicant refuses to sign an assurance of nondiscrimination; 2) the loan official has reason to believe the applicant is in noncompliance; 3) the applicant is a social, civic, or fraternal organization whose constitution or bylaws appear to have exclusionary provisions; 4) a discrimination complaint is filed with OCRC prior to an applicant's receipt of benefits or funding; or 5) the borrower is found in noncompliance or potential noncompliance with SBA's or another agency's nondiscrimination regulations.[62] However, the SBA has not conducted any onsite preaward reviews since 1980.[63] Therefore, it currently has no preaward evaluation process whatsoever. It is unable to determine whether Title VI compliance deficiencies exist prior to providing financial assistance to recipients.

The SBA stated that OCRC currently does not have sufficient staff or resources to conduct preaward evaluations of all applicants for Federal financial assistance.[64] The SBA Administrator pointed out that the SBA has 80,000 recipients and that the number of applicants for financial assistance is even higher.[65] He indicated that it would take more than a modest increase in staff and resources to conduct preaward reviews of all SBA applicants, and that preaward reviews might result in unacceptable delays in the processing of applications for financial assistance.[66]

In its response to the Commission survey, the SBA indicated that all preaward reviews must be onsite reviews, because, under the Paperwork Reduction Act, the Office of Management and Budget (OMB) would not approve the sort of data collection necessary to conduct preaward desk-audit reviews, namely, surveys or questionnaires.[67] However, the SBA's contention that the Paperwork Reduction Act has prevented it from collecting civil rights enforcement data is contrary to the Department of Justice's position. The Department of Justice stated that "the act allow[s] agencies to continue collecting relevant data as long as this data [is] necessary to enforce civil rights" and that "the effect [of the act] on agencies' ability to collect pertinent civil rights data was minimal."[68] Furthermore, many other Federal agencies collect data and conduct desk-audit preaward reviews. The Department of Justice's statement, coupled with the current practices among other Federal agencies to collect data for Title VI enforcement, indicates that the SBA's contention is unfounded.[69]

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[58] *See* discussion below on Data Collection and Analysis on pp. 467–68.

[59] Robinson October 1994 letter, attachment, pp. 19–20. *See also* SBA Standard Operating Procedures, pp. 30–33.

[60] SBA Survey, Q. 42, p. 25.

[61] Ibid., Q. 24, p. 14.

[62] *See* SBA FY 1994 Implementation Plan, pp. 7–8.

[63] SBA Survey, Q. 41, p. 24. *See also* table 12.2. *See also* SBA FY 1994 Implementation Plan, p. 8.

[64] Ibid., Q. 42, p. 25. As indicated above, OCRC has 25 full-time staff members with 2 in the headquarters office and the remainder in 6 central duty station offices.

[65] Lader letter p. 4.

[66] Ibid.

The SBA's failure to conduct preaward reviews removes the agency's ability to reject applications prior to distribution of funding and implementation of the SBA-funded program. Consequently, the SBA may be unable to prevent program beneficiaries and participants from suffering the effects of discrimination before the recipients take corrective actions. In its own Standard Operating Procedures, the SBA identifies many of the benefits of preaward reviews. Among other things, they can "[t]arget recipients for post-approval review," "[i]dentify necessary modification in the application for assistance or in the proposed service delivery system," and "[d]etermine whether the applicant requires technical assistance."[70] With a preaward review process in place, the SBA also could identify recipients in noncompliance before the noncompliance or discriminatory practice adversely impacts on beneficiaries and participants. Furthermore, SBA potentially could reduce the number of postaward reviews that it must perform.

Although the SBA does not conduct preaward reviews, it indicated that it tries to perform postaward reviews on all new recipients during the first year after they have become recipients. The SBA Administrator indicated:

> We believe the cost to the Agency of increasing staff and resources to the extent necessary in order to undertake preaward evaluations of all applicants outweighs the benefits that might be achieved by such an undertaking. Therefore, we believe our staff and resources should continue to focus on recipients of assistance.[71]

### Postaward Desk-Audit Reviews

The SBA has not conducted any postaward desk-audit reviews since 1984. According to the SBA, OMB has prohibited the SBA from conducting desk-audit reviews because of the Paperwork Reduction Act.[72] However, as discussed above, this contention is questionable.

### Postaward Onsite Compliance Reviews

The only type of compliance reviews that the SBA currently performs are postaward onsite compliance reviews. The SBA generally conducts these reviews only for companies with 15 or more employees.[73] As a result, companies with fewer than 15 employees undergo no compliance review process, preaward or postaward, other than ensuring that the companies submit their assurances of nondiscrimination.

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[67] SBA Survey, Q. 42, p. 25.

[68] Gerald W. Jones, Acting Deputy Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, letter to Frederick Isler, Deputy Assistant Staff Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, May 16, 1994, attachment, answer 6, p. 4 (hereafter cited as Jones May 1994 letter).

[69] *See* for examples, chapter 5 (Department of Education), chapter 6 (Department of Health and Human Services), and chapter 8 (Department of Housing and Urban Development).

[70] SBA Standard Operating Procedures, p. 37.

[71] Lader letter, p. 4.

[72] SBA Survey, Q. 45, p. 27. *See also* table 12.2. *See also* discussion of preaward reviews, pp. 461–62.

Compared to most other agencies, the SBA accomplishes a large number of Title VI onsite compliance reviews per work year. In fiscal year 1993, the SBA accomplished 611 onsite compliance reviews, an increase from 492 in 1992.[74] OCRC determined that most recipients were in compliance or that they had only minor administrative deficiencies in their programs which they corrected in a timely manner.[75]

As one of its objectives in its 1994 Civil Rights Implementation Plan, the SBA plans to conduct between 500 and 600 compliance reviews of the SBA's district offices, recipients, conduits, and subrecipients each year.[76] OCRC will provide annual goals for the number of onsite recipient and office reviews to each central office duty station, which must submit monthly reports on the extent of achievement of these goals.[77]

The SBA may be able to accomplish so many onsite reviews because small employers, development companies, or small business investment corporations, may be easier and quicker to evaluate than the large State programs typically examined by other Federal agencies. According to the SBA staff, an experienced staff member can conduct two reviews in one day.[78] However, as indicated below, the SBA provides no formal training to its civil rights staff. The SBA's Standard Operating Procedures manual provides 20 pages of detailed instructions on the onsite compliance review process, including preparation for the review, scheduling and conducting the review, drafting reports on findings, conducting closing conferences, establishing goals and timetables to overcome deficiencies, and followup activities concerning the goals and timetables.[79] The sheer volume of onsite reviews conducted by its limited staff, coupled with the detailed instructions for performing onsite reviews, may also indicate that OCRC staff conduct the reviews in a cursory manner, falling short of the method prescribed.

### Complaint Investigations

The SBA has received only a small number of Title VI complaints each year. Therefore, complaint investigations occur rather infrequently. The number of complaint investigations has increased slightly over time, from 4 in 1981 to 10 in 1993. In 1993 Title VI complaints were approximately one-fifth of the agency's complaint workload.[80] Of the Title VI complaints investigated by OCRC, none has resulted in "cause" findings by the SBA.[81] The SBA closed many of the complaint cases, although a few were withdrawn with or without resolution.[82] As indicated below, the SBA has not placed a high priority on conducting outreach and education. Consequently, applicants, beneficiaries, or program participants may be unaware of their rights to bring Title VI complaints,

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[73] SBA Survey, Q. 68(a), p. 34. The SBA Administrator indicated that the SBA also uses other factors in selecting companies for review, including the composition of the civilian labor force in the area and the amount of financial assistance. Lader letter, p. 5.

[74] SBA Survey, Q. 68, p. 35. *See also* SBA FY 1994 Implementation Plan, p. 24.

[75] SBA FY 1994 Implementation Plan, p. 24.

[76] Ibid., pp. 8, 26.

[77] Ibid., p. 12.

[78] Dockett interview, p. 2.

[79] SBA Standard Operating Procedures, pp. 39–63.

[80] SBA Survey, Q. 71, p. 37. *See also* table 12.2.

[81] SBA Survey, Q. 74, p. 39.

[82] Ibid., Q. 75, p. 40.

**TABLE 12.2**
**Small Business Administration's Title VI Enforcement Activity: Preaward Reviews, Postaward Reviews, and Complaints Received—1976–1993***

| | 1976 | 1981 | 1984 | 1988 | 1992 | 1993 |
|---|---|---|---|---|---|---|
| Preaward reviews | | 0 | 0 | 0 | 0 | 0 |
| Postaward reviews | | | | | | |
| Desk audit | | 17,000 | 23,000 | 0 | 0 | 0 |
| Onsite | 762† | 793 | 631 | 511 | 492 | 611 |
| Complaints | | | | | | |
| All civil rights | 50† | 47 | 25 | 26 | 35 | 47 |
| Title VI | | 4 | 4 | 7 | 5 | 13 |

*SBA does not maintain data for the years prior to 1981.
†Based on SBA's A-11 Budget Submission to the Office of Management and Budget for fiscal year 1976. *See* U.S. Department of Justice, Civil Rights Division, "Agency A-11 Results," *Title VI Forum*, vol. 2, no. 2 (Summer 1977), p. 6.

Source: U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the Small Business Administration, Q. 41, p. 27; Q. 68(c), p. 34; Q. 71, p. 37.

a factor that could explain the small number of Title VI complaints.

The SBA devotes one 20-page chapter in its current Standard Operating Procedures to a discussion of complaint investigations.[83] It meets the requirements of the Department of Justice's coordination regulations. For example, it requires written notification to the complainant regarding the disposition of the case.[84] It also sets out the specific responsibilities of the investigator, provides general guidelines for investigations, and offers specific instructions for preparing and conducting the investigation.[85] It goes beyond the standard in the Commission's *Compliance Officer's Manual*, which states that complaints must be filed within 90 days of the alleged discriminatory practice.[86] The SBA's procedures allow 180 days to file a complaint.[87] Moreover, the SBA has separate procedures for investigation of complaints against recipients and program offices.[88] The SBA's procedures also require the agency to issue decisions within 180 days of the decision to investigate the complaint.[89] Therefore, they ensure prompt attention to complaints. If investigating officers comply with these procedures, their investigations are probably both efficient and thorough and, consequently, provide an effective tool for the SBA's Title VI enforcement program. However, as the number of investigations indicates, the SBA does not use this enforcement mechanism often. An improved outreach and education effort could enable the SBA to use these complaint investigation procedures more frequently and improve the overall effectiveness of its Title VI enforcement program.

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[83] SBA Standard Operating Procedures, pp. 76–96.

[84] Ibid., p. 95. *See* 28 C.F.R. § 42.408(a) (1994).

[85] SBA Standard Operation Procedures, p. 95.

[86] *Compliance Officer's Manual*, § 6.4, p. 9.

[87] SBA Standard Operating Procedures, p. 64.

[88] Ibid.

[89] Ibid, p. 66.

### Deficiencies, Remedies, and Sanctions

In its compliance reviews, the SBA has found a large proportion of recipients in noncompliance because of administrative deficiencies, such as failure to use the equal opportunity byline, display a nondiscrimination poster, or designate an equal opportunity officer.[90] In 1993 approximately two-thirds of all companies reviewed had "minor" administrative deficiencies. However, all of the recipients agreed in writing to remedy the deficiencies, and they later corrected them in a timely manner.[91] Since 1980 the SBA has not determined that any recipients engaged in a blatant discriminatory practice.[92] The SBA reported that, since it can use its ability to accelerate loans as a threat, the agency almost always succeeds in bringing recipients with deficiencies into voluntary compliance, but that one or two recipients per year may repay their loans to avoid governmental oversight.[93] The SBA's comments indicate that its ability to threaten acceleration of loans provides a useful deterrence to Title VI violations as well as an effective means of achieving voluntary compliance. The SBA had only one case in which it reached a final finding of noncompliance,[94] and, thus, it rarely imposes other sanctions.

### Delegation Agreements

In 1993 the SBA sent its proposed delegation agreements to the Department of Education for the monitoring of junior colleges, colleges, and universities that are SBA-funded recipients, and to the Department of Health and Human Services for the monitoring of SBA-funded nursing homes.[95] The Department of Education has not yet agreed with the SBA's delegation proposal. The Department of Health and Human Services has "informally agreed" to the proposal and made recommendations for changes.[96] Neither agency has signed the delegation agreements; thus, the SBA has not implemented them. Currently, the agencies only share monitoring information. They have not implemented any formal enforcement/compliance agreement.[97]

## Outreach and Education

The SBA provides some outreach and education with respect to Title VI and other civil rights statutes. For example, all SBA media announcements and brochures state that the SBA's programs are available to all without discrimination, and the SBA gives all new borrowers a brochure outlining their civil rights responsibilities.[98] It publicizes this information in Spanish as well as English, and in other languages depending on the demographics of the office.[99]

The SBA Administrator acknowledged that "budgetary constraints have curtailed extensive opportunities for outreach in recent years. . . ."[100] However, he indicated that the SBA has provided and participated in "some seminars and training sessions for the public."[101] He cited a pilot project to deliver a series of civil rights seminars to small businesses, indicating that the first seminar had been already been held in St. Louis and had been well-attended.[102]

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[90] Ibid., Q. 67, p. 34.

[91] SBA FY 1994 Implementation Plan, p. 34.

[92] SBA Survey, Q. 68, p. 35.

[93] Ibid., Q. 67, p. 34.

[94] This case was in 1976. *See* ibid.

[95] SBA FY 1994 Implementation Plan, p. 11.

[96] Ibid.

[97] Ibid.

[98] SBA Survey, Q. 46, p. 28.

[99] Ibid., Q. 47, p. 28; Lader letter, p. 5.

[100] Lader letter, p. 5.

Despite these efforts, the SBA's existing outreach and education efforts are not comprehensive, which may explain the small number of Title VI complaints received at the SBA. For example, the SBA does not have a plan for ensuring that recipients receive regular education and assistance. An effective outreach and education program would ensure that recipients understood their Title VI obligations and that applicants, beneficiaries, and other program participants knew their rights as well as the procedures for bringing complaints.

### Technical Assistance

The SBA provides technical assistance to its recipients upon request and during the course of onsite compliance reviews,[103] but does not conduct training seminars for recipients.[104] One of the SBA's stated long-range goals is "to maximize the number of recipients in compliance with civil rights requirements through a preventive program of technical assistance and monitoring."[105] The SBA uses onsite reviews to provide extensive technical assistance to recipients on their civil rights obligations, including those under the Immigration Reform and Control Act and the Americans with Disabilities Act of 1990.[106]

It also provides technical assistance to members of the small business community and others upon request. During fiscal year 1993, the SBA provided such assistance to more than 3,500 small businesses, either in personal consultations or by telephone.[107] The SBA also held meetings with SBA personnel and volunteers "concerning their civil rights posture and reasonable accommodation for individuals with handicaps."[108] Furthermore, the SBA provided technical assistance through recommendations made in meetings and in writing after the completion of all onsite recipient and program office reviews.[109]

Technical assistance is an area of concentration in the SBA's civil rights implementation and enforcement program. The agency has incorporated technical assistance throughout its compliance program. It conducts an ongoing technical assistance program for all persons involved in its Federal assistance program, and it has a process for reporting and recording the number and types of assistance offered and requested. However, over the past several years, the SBA has targeted its technical assistance to the discrimination provisions of the Immigration Reform and Control Act, the Americans with Disabilities Act, and government contractors' affirmative action responsibilities, but not Title VI.[110]

## Staff Training

The SBA performs very little staff training. The SBA has not provided any formal staff training for 3 years because of reductions in the agency's travel budget.[111] According to the SBA Administrator, "Unfortunately, budgetary constraints over the last few years have not permitted formal training for the staff."[112] New staff receive only informal, on-the-job training.[113] However, the Administrator indicated that, because of low staff turnover, most of the SBA civil rights staff is experienced and has received formal training.[114]

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[101] Ibid.

[102] Ibid.

[103] SBA Survey, Qs. 52, 54, p. 29; SBA FY 1994 Implementation Plan, pp. 8–9.

[104] SBA Survey, Qs. 52, 54, p. 29.

[105] SBA FY 1994 Implementation Plan, p. 17.

[106] Dockett interview, p. 2. *See also* SBA FY 1994 Implementation Plan, pp. 8–9. The SBA Administrator indicated that he did not believe that the SBA's emphasis on the Americans with Disabilities Act and the Immigration Reform and Control Act has diminished its effectiveness in delivering technical assistance on Title VI. Lader letter, p. 5.

[107] SBA FY 1994 Implementation Plan, p. 24.

[108] Ibid.

[109] Ibid.

[110] *See* ibid., pp. 24, 26; SBA FY 1993 Implementation Plan, pp. 9, 25–26.

In general, SBA's civil rights enforcement staff receive on-the-job training.[115] During 1993, the SBA provided training to its staff on new policies and procedures through memoranda, conference calls, and transmittal of various materials. It did not hold any workshops or conferences during the fiscal year because of budget constraints.[116] The SBA indicated that although OCRC places a high priority on staff training,[117] the SBA does not anticipate that funds will be provided for substantive staff training in the near future.[118]

The lack of formal staff training is problematic in light of the SBA's nearly total reliance on onsite reviews for its Title VI enforcement process. The SBA's Standard Operating Procedures manual does provide detailed instructions for conducting onsite compliance reviews.[119] However, these instructions cannot substitute for formal training on how to analyze properly the information collected during the reviews. Moreover, on-the-job training alone may not be enough to train new staff properly on conducting onsite compliance reviews. As noted above, the sheer number of onsite reviews performed by OCRC staff each year may indicate that they are not conducted as thoroughly as the procedures manual prescribes. Formal training workshops would help to ensure that existing and new OCRC staff are knowledgeable on how to conduct thorough onsite reviews, and specifically on the proper methods of ensuring compliance under Title VI.

## Data Collection and Analysis

Despite requirements under the Department of Justice's coordination regulations and the SBA's own Title VI regulations,[120] the SBA does not collect an adequate amount of data from its recipients for Title VI enforcement purposes. It does not have any system for collecting data from its applicants or recipients, other than some data collected during onsite compliance reviews. The SBA stated that it does not require recipients to develop a system of base data collection because most of its recipients are either small businesses or disaster victims.[121] Moreover, it does not require recipients to submit annual reports comparing program participation with eligibility, purportedly because the Paperwork Reduction Act prevents it from doing so.[122] However, as noted above, the Department of Justice clearly indicated that the effect of the act on civil rights data collection was minimal and that the act allows data collection necessary to enforce civil rights.[123] Therefore, the Department of Justice's position indicates that the SBA's justification is unfounded. The agency's lack of a data collection system is a serious deficiency in its Title VI enforcement program. It already has drastically reduced the effectiveness of the agency's enforcement process because, according to the SBA, the absence of data collection has prevented it from conducting preaward reviews and postaward desk-audit reviews.

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[111] SBA Survey, Q. 39, p. 23.

[112] Lader letter, p. 6.

[113] SBA Survey, Q. 49, p. 28. *See also* Dockett interview, p. 3.

[114] Lader letter, p. 6.

[115] Ibid.

[116] SBA FY 1994 Implementation Plan, p. 12.

[117] *See* SBA Survey, Q. 39, p. 23.

[118] SBA FY 1994 Implementation Plan, p. 12.

[119] SBA Standard Operating Procedures, pp. 39–63.

[120] *See* 28 C.F.R. § 42.406 (1994); 13 C.F.R. § 112.9(b) (1994).

[121] SBA Survey, Q. 59, p. 31.

[122] Ibid., Q. 62, p. 32. *See* above discussion under preaward reviews.

The SBA's program offices do collect racial and ethnic information on applicants for assistance.[124] The SBA indicated that the Office of Information Resources Management collects the data, and OCRC analyzes the information to determine compliance status of a recipient business.[125] The revised Standard Operating Procedures specify that all agency program offices must collect data to enforce nondiscrimination.[126] However, since the SBA has not formally adopted these procedures, it does not explicitly require program offices to collect and maintain these data. Even if the agency adopts these procedures, the data will be less helpful to the SBA without an effective information management system. The adoption of these revised procedures should lead to an increased emphasis on development of a data collection system and may prompt the implementation of a preaward review process.

## Civil Rights Implementation Plans

The Commission reviewed the SBA's Civil Rights Implementation Plans for the years 1990 to 1994. The plans are thorough and follow the basic outline required by the Department of Justice. However, they give no indication that the SBA developed them as part of a planning process based on the agency's expected budget, staffing, and workload. Moreover, they provide no evidence that the SBA has engaged in the type of comprehensive planning necessary to justify increases in budget and staff.

The 1990 plan identifies five long-range goals:

1) To assure access to the SBA's financial assistance by all applicants on a nondiscriminatory basis;

2) To assure timely processing of all complaints of discrimination and to assure nondiscrimination in all programs funded and administered by the SBA;

3) To maximize the number of recipients and other small businesses in compliance with civil rights requirements through a preventative program of technical assistance and monitoring;

4) To assure compliance with Part 136 of the SBA's rules and regulations;[127] and

5) To provide the necessary management oversight and policy direction to assure that the agency's federally conducted and assisted programs or activities utilize uniform civil rights standards and procedures that result in timely, consistent, and effective enforcement.[128]

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[123] Jones May 1994 letter, attachment, answer 6, p. 4.

[124] George H. Robinson, Assistant Administrator for Equal Employment Opportunity and Civil Rights Compliance, letter to Frederick D. Isler, Acting Assistant Staff Director, Office for Civil Rights Evaluation, U.S. Commission on Civil Rights, July 8, 1994.

[125] SBA Survey, Q. 25(f), p. 15.

[126] Robinson October 1994 letter, attachment, p. 19.

[127] Part 136 deals with nondiscrimination based on disability in federally conducted programs or activities. This fourth goal is not relevant to Title VI.

[128] SBA FY 1990 Implementation Plan, pp. 14–23.

The plan also lists 9 major objectives and 52 short-term objectives designed to meet the long-range goals.[129] Subsequent-year plans restate the long-range goals, major objectives, and short-term objectives[130] and report on progress made towards accomplishing them.[131]

The SBA's 1994 Civil Rights Implementation Plan frames some of the SBA's major objectives and short-term objectives in a way that makes their achievement or nonachievement ascertainable. For example, one major objective is to conduct 500 onsite compliance reviews of the SBA's district offices, recipients, conduits, and subrecipients.[132] Other objectives, however, are vague or do not imply standards for measuring accomplishment. For instance, one short-term objective is to assist members of the small business community in complying with civil rights requirements on an as-needed basis.[133]

The SBA's Civil Rights Implementation Plans contain thorough progress reports, but some claim success with little substantiation.[134] For example, each year the SBA declared that it had achieved its first long-range goal of assuring provision of services on a nondiscriminatory basis based on the evidence that it had not received many substantiated complaints of discrimination.[135] However, the SBA did not review each of its recipients for compliance. It was not possible for the SBA to know, based on complaints alone, that all recipients were in compliance with Title VI and other civil rights statutes. Similarly, the SBA declared that it had achieved its third long-range goal, maximizing the number of recipients in compliance with civil rights requirements through technical assistance and monitoring, in 1993. It offered the evidence that it had completed 611 onsite compliance reviews, only 1 of which resulted in a finding of noncompliance, and had given technical assistance to more than 3,500 small businesses.[136]

One consistent failure over the past 4 years has been the SBA's inability to accomplish its goal of updating its regulations. Each year, the SBA planned to update the regulations,[137] and each year, this goal was not fulfilled.[138] The SBA did make progress in updating its procedures, but, as noted above, it has not formally adopted them. As with the attempts to update the SBA's Title VI regulations, OEEO&C attributed the delay in adopting the updated procedures on the Office of the General Counsel. Both of these delays evidence OEEO&C's need for its own legal support staff.

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[129] Ibid.

[130] *See* SBA FY 1991 Implementation Plan, pp. 14–23; SBA FY 1992 Implementation Plan, pp. 14–23; SBA FY 1993 Implementation Plan, pp. 14–23; and SBA FY 1994 Implementation Plan, pp. 13–22.

[131] *See* SBA FY 1991 Implementation Plan, pp. 24–29; SBA FY 1992 Implementation Plan, pp. 24–29; SBA FY 1993 Implementation Plan, pp. 24–29; and SBA FY 1994 Implementation Plan, pp. 23–27.

[132] *See* SBA FY 1994 Implementation Plan, p. 17.

[133] Ibid., p. 18.

[134] *See* SBA FY 1991 Implementation Plan, pp. 24–29; SBA FY 1992 Implementation Plan, pp. 24–29; SBA FY 1993 Implementation Plan, pp. 24–29; and SBA FY 1994 Implementation Plan, pp. 23–27.

[135] SBA FY 1990 Implementation Plan, p. 24; SBA FY 1991 Implementation Plan, p. 24; SBA FY 1992 Implementation Plan, p. 24; SBA FY 1993 Implementation Plan, p. 24; SBA FY 1994 Implementation Plan, p. 23.

[136] SBA FY 1993 Implementation Plan, p. 24.

[137] *See* SBA FY 1990 Implementation Plan, p. 22; SBA FY 1991 Implementation Plan, p. 22; SBA 1992 Implementation Plan, p. 22; SBA FY 1993 Implementation Plan, p. 22; SBA FY 1994 Implementation Plan, p. 21.

[138] *See* SBA FY 1990 Implementation Plan, p. 26; SBA FY 1991 Implementation Plan, p. 26; SBA 1992 Implementation Plan, p. 26; SBA FY 1993 Implementation Plan, p. 26; SBA FY 1994 Implementation Plan, p. 27.

# Findings and Recommendations

## Organization, Budget, Staffing, and Workload

### Organization

**Finding:** The organizational structure of the Office of Equal Employment Opportunity & Civil Rights Compliance (OEEO&C) is generally conducive to effective Title VI enforcement. OEEO&C has a separate unit with its own supervisor devoted to external civil rights enforcement. Furthermore, the Small Business Administration (SBA) has recently elevated the position of the head of OEEO&C, who now reports directly to the Administrator. Finally, all of the civil rights compliance staff at the SBA, even those outside of the Washington, D.C., headquarters, report to the head of the Office of Civil Rights Compliance (OCRC). Thus, the OCRC has the necessary authority to ensure that staff engaged in external civil rights activities enforce Title VI effectively and uniformly. However, the organizational structure of civil rights enforcement at the SBA fails to provide for two crucial elements of Title VI enforcement, the need to develop and maintain implementing regulations, guidelines, policies, and procedures for Title VI and the need to engage in program planning. OCRC does not have either a policy and legal staff or program planning staff to conduct these activities. Consequently, OCRC has had to rely on the assistance of the Office of General Counsel in these areas, with the result that revisions to OCRC's regulations and procedures have been delayed, and OCRC has not engaged actively in policy development.[139]

**Recommendation:** The SBA should retain the key features of the current organizational structure of its civil rights enforcement program. However, the SBA should create within OCRC a separate staff capable of providing policy and legal support on Title VI, as well as program planning for the office. In particular, legal support staff within OCRC would review enforcement cases for legal sufficiency, develop guidance materials, and serve as liaison to the Office of General Law and the Office of Litigation. OCRC policy staff would work with program staff in analyzing and developing policies on how existing and new programs impact on civil rights enforcement.

### Budget, Staffing, and Workload

**Finding:** The SBA appropriation does not have a specific allotment for external civil rights enforcement, nor does SBA have in place a mechanism for tracking its expenditures on civil rights enforcement in federally assisted or conducted programs generally, or on Title VI specifically. Thus, the SBA does not have in place an information management system necessary for sound management planning.[140]

**Recommendation:** OEEO&C should develop an information management system that allows it to track its expenditures on and time devoted to various civil rights activities, such as postaward reviews, complaint investigations, and technical assistance. OEEO&C should use the system in its program planning. Specifically, the information system should help guide its resource allocation among civil rights activities. OEEO&C should use the system in developing an annual civil rights enforcement plan that lays out specific program goals and objectives and assigns specific resources to accomplish them. Furthermore, OEEO&C should use the information system to demonstrate to the agency's offices on budget and planning the importance of increased resources for Title VI enforcement.

**Finding:** The SBA's civil rights budget and staffing have decreased over time. For instance, the agency's civil rights staff is 30 percent smaller than it was in 1976. However, although the SBA's civil rights resources declined, the civil rights workload increased. These trends have made it difficult for the SBA to enforce Title VI effectively.[141]

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[139] *See* pp. 453–55.

[140] *See* p. 455.

[141] *See* p. 456.

**Recommendation:** The Assistant Administrator of OEEO&C should conduct the necessary evaluation and submit the appropriate justification documents to support a budget increase for additional resources for the SBA's Title VI enforcement program. To do this, however, OEEO&C needs to have in place an information management system allowing it to track its expenditures on various civil rights activities, show how its resources are being used, document the extent of the SBA's workload, and develop a management plan demonstrating the need for additional resources.

In the short term, OEEO&C should consider redeploying its existing staff resources to increase the number of staff in OCRC headquarters. This arrangement will permit OEEO&C to commence fulfilling its legal, policy, and program planning functions relative to Title VI. OEEO&C should consider moving staff from OCRC's central duty office stations to the headquarters office, or moving staff from internal equal employment opportunity functions to external civil rights enforcement. Alternatively, the SBA could assign legal staff from the Office of the General Counsel to OEEO&C.

## Regulations, Guidelines, Policies, and Procedures

### Regulations

**Finding:** The SBA's Title VI regulations are inadequate in certain respects. The regulations have not been updated to reflect the Civil Rights Restoration Act of 1987's clarifications on Title VI's coverage and fund termination provisions. Furthermore, the appendix listing the SBA federally funded programs covered by Title VI has not been updated for at least 10 years.

Although the regulations are patterned after the Department of Education's "model" regulations, they differ from the model in the following ways:

- they do not prohibit denying "an individual the opportunity to participate in the program through the provision of services or otherwise afford[ing] him an opportunity to do so which is different from that afforded others under the program"; and
- they do not prohibit denying "a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program."

As noted above, a critical factor hampering the SBA's ability to revise its regulations is the absence of legal support within OEEO&C. OEEO&C has depended on the SBA's Office of General Counsel to perform this function, resulting in significant delays in accomplishing revisions.[142]

**Recommendation:** The SBA should update and revise its Title VI regulations to reflect the clarifications made by the Civil Rights Restoration Act of 1987. SBA also should publish a revised list of its federally assisted programs in the *Federal Register* each year. As an alternative to formally updating its appendix of programs, the SBA should publish a catalog or brochure listing all federally assisted programs covered under Title VI and reference this catalog or brochure in its regulations. The SBA also should make this catalog or brochure available to recipients , actual and potential program beneficiaries, and the public generally as a means of providing education on Title VI. To ensure that OEEO&C is able to develop and issue revised regulations, the SBA should provide the office with its own legal support.

**Finding:** Despite critical omissions, the provisions of the SBA's Title VI regulations are stronger with respect to coverage of employment discrimination under Title VI than the corresponding provisions in the Department of Education's model regulations. The regulations contain a blanket prohibition against any discriminatory employment practice by small business concerns and development companies that apply for or receive any financial assistance from the SBA, because "[such] assistance is deemed to have as a primary objective the providing of employment."

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[142] *See* pp. 457–59.

Furthermore, the regulations specify more clearly why discriminatory employment practices are prohibited by Title VI even in programs whose primary purpose is not the provision of employment, and they extend the protection against employment discrimination not just to beneficiaries or potential beneficiaries, but to any individual subjected to discrimination under an SBA-funded program.[143]

**Recommendation:** The SBA should retain in its Title VI regulations its current language with respect to employment discrimination. Furthermore, other agencies should consider incorporating the SBA's language, or other similar language, into their Title VI regulations.

### Guidelines and Policies

**Finding:** One critical role of an agency's civil rights office is to provide leadership on Title VI by issuing Title VI guidelines and policies. However, the SBA has done neither of these. The SBA has issued no Title VI guidelines for its federally assisted programs. Furthermore, the SBA has issued no policy statements clarifying the meaning and implications of Title VI for its federally assisted programs. For instance, the SBA has not issued policy guidance on the Civil Rights Restoration Act of 1987, which, in the absence of revised Title VI regulations, could have explained the implications of the act for Title VI enforcement. The failure of the SBA to develop Title VI guidelines and issue Title VI policies indicates that OEEO&C is not fulfilling adequately its leadership role in the area of Title VI enforcement.[144] A major reason why OEEO&C is not providing adequate policy guidance on Title VI is the lack of policy staff within OCRC.[145]

**Recommendation:** The SBA should commence fulfilling its responsibility to develop Title VI guidelines and policies. The SBA should issue guidelines and policies that clarify the application of Title VI to the SBA's programs. In lieu of revising its Title VI regulations, the SBA should use guidelines to describe the nature of Title VI coverage in SBA's programs given the clarification made by the Civil Rights Restoration Act. Specifically, SBA's guidelines should acknowledge the meaning of "programs and activities" defined by the act, especially with respect to corporations, partnerships, and other business organizations, since the SBA administers many loan programs for minority-owned businesses or through development and small business investment companies. Through guidelines, the SBA should describe program-specific methods of enforcement; examples of prohibited practices; required or suggested remedial action; and the nature of requirements relating to covered employment, data collection, complaints, and public information. The SBA also should develop an active policy program. Furthermore, through a policy statement, the SBA should clarify the implications of the Civil Rights Restoration Act for the agency's fund termination remedy.

To fulfill its policy function adequately, the SBA needs to provide OEEO&C with legal and policy staff whose chief function is the development of implementing regulations, guidelines, policies, and procedures for civil rights enforcement.

### Procedures

**Finding:** The SBA has comprehensive procedures for all of its nondiscrimination regulations, Federal civil rights statutes, and Executive orders. However, the SBA has been attempting, for several years, to draft and issue revised standard operating procedures. This process has been hampered by poor communications between the Office of General Counsel and OEEO&C and by the absence of policy and legal support within OEEO&C. Currently, the SBA has a draft of the revised procedures, but has not yet issued them formally.

The SBA's draft revised procedures contain many improvements over the existing procedures. In particular, they expand requirements for data collection, an area in which the SBA's

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[143] *See* p. 459.

[144] *See* pp. 459–60.

[145] *See* p. 455.

Title VI enforcement process needs improvement. The enhanced data collection procedures would permit the SBA to commence conducting preaward and postaward desk-audit reviews, an area in which the Title VI enforcement process at the SBA is seriously lacking. However, the revised procedures omit some important sections of the existing regulations, specifically, the section on goals and timetables, which distinguishes "goals" from "quotas."[146]

**Recommendation:** The SBA should proceed to finalize its revised civil rights compliance and enforcement procedures. In doing so, the SBA should ensure that it improves on the existing procedures without dropping strong existing features, such as the section on goals and timetables.

## Title VI Enforcement Process

### Preaward Reviews

**Finding**: The SBA does not conduct preaward reviews of recipients to ensure that they are in compliance with Title VI before they are granted Federal financial assistance. Some of the reasons the SBA gives for not conducting preaward reviews are unconvincing. The SBA maintains that it does not have the resources to conduct preaward reviews. However, the SBA appears to be under the mistaken impression that to conduct preaward reviews it must conduct onsite reviews. The SBA mistakenly claims that the Paperwork Reduction Act precludes it from collecting the necessary information from applicants and recipients to conduct desk-audit reviews. If the SBA were to collect the necessary information from applicants, it might be able to perform preaward desk-audit reviews with its existing resources.

However, a factor that might make it difficult for the SBA to conduct preaward reviews, given its existing level of resources, is the large number of applications for financial assistance it receives —more than 80,000 per year. To collect and analyze the necessary data from this many applicants for assistance and to do preaward desk-audit reviews on all would require substantial staff resources, as well as a sophisticated information management system.[147]

**Recommendation:** Given the large number of applications for financial assistance from the SBA and the poor prospects for major increases in the SBA's civil rights staff, it is acceptable for the SBA generally to forego conducting preaward reviews of applicants and focus instead on conducting postaward reviews. However, before granting assistance, the SBA should consult its own files and with the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs to determine whether applicants have undergone previous compliance reviews or have had civil rights complaints filed against them. If previous compliance reviews and complaint investigations have resulted in findings of noncompliance, or if investigations are still pending, the SBA should conduct a preaward review of the applicant before releasing funds.

However, since the SBA does not conduct preaward reviews, the SBA should take every effort to ensure that all new recipients of SBA assistance are informed fully of their responsibilities under Title VI and other civil rights laws. The SBA should provide new recipients, along with the Title VI assurance form, with a detailed brochure explaining their responsibilities and giving concrete examples of compliance and noncompliance as they apply to SBA programs and recipients, as well as an extensive checklist to assist them in determining their compliance status.

### Postaward Reviews

**Finding:** The SBA's proactive Title VI enforcement program currently relies almost exclusively on onsite postaward reviews of recipients. However, these reviews do not cover all recipients—most recipients with fewer than 15 employees are exempted from the reviews. In addition, although the SBA reviews all recipients with more than 15 employees within a year of their receiving SBA assistance, the SBA compliance reviews focus primarily on recipients' employment practices rather than on other forms of discrimination under Title VI. Although the SBA's procedures require a comprehensive evaluation of recipients, the sheer volume of reviews the SBA conducts (500 to 600 compliance reviews each year) in comparison to the size of its civil rights staff suggests the reviews are cursory.

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[146] *See* pp. 461–62.

[147] *See* pp. 462–63.

Furthermore, for the same stated reasons as for preaward desk-audit reviews, the SBA does not conduct postaward desk-audit reviews. Therefore, the SBA fails to make use of a cost-effective means of evaluating the Title VI compliance status of recipients. If the SBA conducted postaward desk-audit reviews of its recipients, resources would be available for the SBA to conduct more indepth onsite compliance reviews of selected recipients.[148]

**Recommendation:** The SBA should reallocate its resources devoted to postaward reviews to ensure that it conducts postaward desk-audit reviews of all recipients, including those with fewer than 15 employees. The SBA also should conduct onsite compliance reviews of its recipients, but these should be more comprehensive evaluations than are currently done. The SBA should ensure, in particular, that onsite compliance reviews cover the totality of the practices of its recipients, as covered under Title VI, and not restrict the focus to recipients' employment practices. For instance, the loan programs of recipients that grant loans to subrecipients should be scrutinized to ensure that loans are made available on an equitable basis. For instance, the location of recipients' loan offices should be accessible to all communities in the recipient's area, regardless of race, color, or national origin.

### Complaint Investigations

**Finding:** The SBA's complaint processing procedures are comprehensive. They go beyond minimum requirements by allowing individuals 180 days to file a complaint and by requiring the agency to issue a decision within 180 days of the decision to investigate the complaint. However, despite the existence of comprehensive procedures for processing Title VI complaints, the Agency receives only a small number of Title VI complaints each year. The lack of Title VI complaints to the SBA possibly is an indication that the agency does not conduct sufficient outreach and education on Title VI for individuals to understand their rights under the act, including that Title VI applies to SBA-funded programs and how to file claims of discrimination.[149]

**Recommendation:** The SBA's complaint processing procedures do not need to be modified. Instead, the SBA should concentrate its efforts on improving its outreach and education on Title VI to ensure that all individuals affected by the SBA's federally assisted programs understand their rights under Title VI and are aware of the procedures for filing claims of discrimination.

### Deficiencies, Remedies, and Sanctions

**Finding:** The ability of the SBA to accelerate the loans of recipients it finds in noncompliance is an effective means of encouraging recipients that the SBA has found in noncompliance to take necessary corrective actions.[150]

**Recommendation:** The SBA should continue to use its ability to accelerate recipients' loans as a possible sanction for noncompliance with Title VI.

### Delegation Agreements

**Finding:** The SBA has developed proposed delegation agreements with the Department of Education and the Department of Health and Human Services to give these departments the responsibility for monitoring SBA-funded institutions of higher education and SBA-funded nursing homes, respectively. However, the SBA has not yet implemented these proposed agreements. Thus, the SBA currently is not monitoring adequately the compliance status of SBA recipients covered under the proposed agreements.[151]

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[148] *See* p. 463.

[149] *See* pp. 463–64.

[150] *See* pp. 464–65.

[151] *See* p. 465.

**Recommendation:** The SBA should ensure that the Department of Education and the Department of Health and Human Services have Title VI programs that meet the requirements of the Department of Justice's coordination regulations and that contain all key elements to ensure compliance with Title VI. It should consult with the Department of Justice to determine the adequacy of the agencies' Title VI programs before formally delegating its Title VI enforcement responsibility for any SBA-funded programs. Once it establishes the adequacy of the Title VI programs, it should achieve final delegation agreements with the Department of Education and the Department of Health and Human Services.

### Outreach and Education

**Finding:** Although the SBA makes some efforts to provide outreach and education on Title VI and other civil rights statutes, these efforts are insufficient. However, the SBA has not made it a priority to develop a comprehensive Title VI outreach and education program that would include other means of communicating with the public, such as sponsoring workshops or conferences on civil rights issues.[152]

**Recommendation:** The SBA should place greater emphasis on outreach and education than it currently does. It should develop an action plan for informing persons affected by its programs of their rights and responsibilities under Title VI and other civil rights statutes. The SBA should incorporate various strategies for reaching the public in its plan, including using the media, sponsoring workshops at conferences attended by SBA's recipients and beneficiaries, and developing informational brochures for distribution by recipients.

### Technical Assistance

**Finding:** The SBA has an active technical assistance program that provides information to its recipients during compliance reviews, meetings, and telephone contacts. However, the bulk of its technical assistance focuses on issues that are not related to Title VI, such as the Americans with Disabilities Act of 1990 and the Immigration Reform and Control Act, and Government contractors' affirmative action responsibilities. Thus, the SBA has neglected to ensure that its recipients are given the necessary technical assistance to comply with Title VI.[153]

**Recommendation:** SBA should endeavor to provide its recipients with the same level of technical assistance on Title VI that it offers on other civil rights issues. Thus, the SBA should provide technical assistance on Title VI through the same types of channels it uses to provide information on other civil rights statutes. In particular, the SBA should provide technical assistance on Title VI during compliance reviews, meetings, and over the telephone.

## Staff Training

**Finding:** Staff in OCRC, which is in charge of Title VI enforcement at the SBA, are poorly trained on Title VI. The SBA offers no formal civil rights training to its staff, nor does it anticipate doing so in the near future, a situation it attributes to a lack of funds. However, the lack of training for the SBA's civil rights staff seriously impairs the quality of the SBA's Title VI enforcement program. The SBA relies heavily on its staff to conduct compliance reviews of its recipients, but does not ensure that its staff has adequate knowledge to conduct these reviews effectively. For instance, the SBA does not train its staff on how to analyze the data collected during the compliance reviews.[154]

**Recommendation:** The SBA should devote resources immediately to training its civil rights staff on Title VI and other civil rights statutes. The staff need an initial intensive course to bring their civil rights knowledge up to an acceptable level and annual training thereafter to permit staff to refresh their understanding of Title VI, to ask questions and receive answers based on their experiences with conducting Title VI compliance and enforcement activities, and to update their knowledge as new Title VI issues emerge. The training should not only include information on the SBA's procedures for enforcing Title VI, but also should provide staff with a thorough understanding of SBA's federally assisted programs.

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[152] *See* pp. 465–66.

[153] *See* p. 466.

[154] *See* pp. 466–67.

## Data Collection and Analysis

**Finding:** The SBA has completely neglected its responsibility to collect and analyze data as part of its Title VI compliance program. Furthermore, the SBA's contention that the Paperwork Reduction Act prevents it from collecting data from its recipients is inaccurate. The SBA's failure to require that its recipients report the information needed to conduct meaningful civil rights analyses has drastically reduced the effectiveness of the SBA's Title VI enforcement process. For instance, the lack of data prevents the SBA from making use of two effective Title VI enforcement mechanisms, preaward and postaward desk-audit reviews.[155]

**Recommendation:** The SBA should proceed to implement its revised operating procedures, which require that program offices collect data to enforce nondiscrimination requirements. The SBA should ensure that it collects sufficient data from its recipients to conduct civil rights analyses of their compliance with Title VI as well as the overall compliance status of the SBA's federally funded programs. The SBA should require direct loan recipients to provide data on their ownership and work force, by race, color, and national origin; and their location, by demographic composition of the surrounding neighborhoods. The SBA should require small business investment companies to provide data on the ownership, by race, color, and national origin, and the location, by demographic composition of the neighborhood, of the businesses to which they make loans. In addition, the small business investment companies should be required to submit data on the demographic composition of their decisionmaking boards, on their employment practices, and on their loan application procedures and policies.

The SBA should use these data to ascertain the compliance status of recipients of SBA assistance through postaward desk-audit reviews. The reviews should consider the employment practices of all recipients. In addition, for recipients such as the small business investment companies, the SBA preaward reviews should assess whether the recipients provide loans on an equal opportunity basis and to businesses operating in all segments of the community. Furthermore, for the SBA's direct loan programs, the SBA should use the data to ascertain whether the SBA's funding decisions have an adverse impact on minority communities. Thus, the SBA should analyze each of its federally assisted programs to ensure that SBA loans are awarded on an equitable basis to all segments of the community and, also, that the loans are made to businesses that have a positive effect on minority communities. For instance, the SBA should consider whether it provides loans to businesses that operate in minority neighborhoods as well as businesses located in predominantly white neighborhoods.

## Civil Rights Implementation Plans

**Finding:** The SBA's Civil Rights Implementation Plans do not fulfill the objectives specified by the Department of Justice in its "Guideline for Agency Implementation Plans Required by Executive Order 12250, 'Leadership and Coordination of Nondiscrimination Laws.'" Although they follow the outline prescribed by the Department of Justice, they show no evidence that they are used by the SBA in its civil rights planning. The plans' goals and objectives sections and the corresponding progress reports are particularly inadequate. Most of the goals and objectives are extremely vague and do not have timetables or standards for measuring their accomplishment. Furthermore, although the plans' progress reports are extremely thorough, they often claim that the SBA has successfully achieved very broad goals, but provide little substantiation for the claim.[156]

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[155] *See* pp. 467–68.

[156] *See* pp. 468–69.

**Recommendation:** The SBA should develop its Civil Rights Implementation Plans in accordance with the Department of Justice's "Guideline for Agency Implementation Plans Required by Executive Order 12250, 'Leadership and Coordination of Nondiscrimination Laws.'" In particular, the SBA should attempt to use the Civil Rights Implementation Plans as a management tool, as required in the Department of Justice's guideline. Furthermore, the SBA should attempt to develop goals and objectives that have timetables and specific standards for achievement, and to use the plans' progress reports to indicate the agency's success or lack thereof towards achieving these goals and objectives.

## Chapter 13

# Office of Justice Programs, U.S. Department of Justice

In 1984 Congress created the Office of Justice Programs (OJP), within the U.S. Department of Justice, to coordinate the activities of several Justice Department bureaus that disseminate Federal criminal justice funds.[1] Headed by the Assistant Attorney General for the Office of Justice Programs, OJP consists of five bureaus, including the Bureau of Justice Assistance, the Bureau of Justice Statistics, the National Institute of Justice, the Office for Victims of Crime, and the Office of Juvenile Justice and Delinquency Prevention, and a variety of administrative offices, including the Office of Civil Rights discussed below. The OJP bureaus are semi-autonomous entities, each headed by a Presidential appointee.[2]

Although it is the largest fund-granting agency within the Department of Justice,[3] OJP operates a small Title VI enforcement program. In 1993 its Office of Civil Rights had a total staff of three full-time equivalent positions (FTEs) and a budget of under $100,000.[4] OJP distributes $790 million through 20 different programs to 601 recipients.[5]

## OJP's Federally Assisted Programs

OJP administers a variety of federally assisted programs through its bureaus and offices:

- *The Bureau of Justice Assistance* operates a formula grant program that provides funds to States according to their population. States distribute the funds to State and local criminal justice agencies to implement statewide drug control and violent crime strategies developed by the States. It also administers a discretionary grant program that provides funds to variety of recipients that operate programs of national significance with respect to drug and crime control.[6]

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[1] U.S. Department of Justice, Office of Justice Programs, *Office of Justice Programs Annual Report, Fiscal Year 1992*, pp. 1–2 (hereafter cited as OJP Annual Report). OJP was created by the Justice Assistance Act amendment to the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §§ 3711 (1988).

[2] Ibid.; U.S. General Accounting Office, *Office of Justice Programs: Discretionary Grants Reauthorization*, (November 1992), p. 3. From 1969 to 1984, what is now known as the Office of Justice Programs was called the Law Enforcement Assistance Administration.

[3] Deval L. Patrick, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, letter to Mary F. Berry, Chairperson, U.S. Commission on Civil Rights, Apr. 28, 1995, p. 2 (hereafter cited as Patrick April 1995 letter).

[4] U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Justice, Office of Justice Programs, Q. 17, p. 18 (hereafter cited as OJP Survey). By 1995, this number increased to seven. Deval L. Patrick, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, letter to Mary F. Berry, Chairperson, U.S. Commission on Civil Rights, Apr. 28, 1995 (hereafter cited as Patrick April 1995 letter), attachment 3, "Response to the Report of the U.S. Commission on Civil Rights Regarding OJP's Title VI Enforcement" (hereafter cited as Response Regarding OJP's Title VI Enforcement, attachment 3 to Patrick April 1995 letter).

[5] OJP Survey, Q. 19, pp. 19–20; U.S. Department of Justice, Office of Justice Programs, "Fiscal Year 1994 Civil Rights Implementation Plan," FY 1993 Civil Rights Workload and Performance Data, p. 1 (hereafter cited as OJP FY 1994 Implementation Plan).

[6] OJP Annual Report, pp. 3–31.

- *The Bureau of Justice Statistics*, which is the Nation's primary source for criminal justice statistical information, provides some funds to State statistical and operating agencies for the collection and analysis of criminal justice data.[7]

- *The National Institute of Justice* funds research, development, evaluation, and dissemination of programs to prevent and control crime and improve the criminal justice system.[8]

- *The Office of Juvenile Justice and Delinquency Prevention* gives both discretionary and formula grants in the area of juvenile justice and delinquency prevention. For example, it funds a project designed to reduce juvenile crime and drug activity in public housing and a research program on prevention of and intervention for illegal drug use and AIDS among high-risk youth, as well as numerous other programs. The office provides formula grants to States to assist them in the prevention and control of delinquency. The office also supports various technical assistance endeavors to help States address juvenile delinquency issues.[9]

- *The Office for Victims of Crime* provides compensation funds directly to victims of crime and also funds programs to assist crime victims.[10]

## Organization, Budget, Staffing, and Workload of OJP's Civil Rights Enforcement Function

OJP's Office of Civil Rights (OCR) is headed by a Director who reports directly to the agency administrator, the Deputy Assistant Attorney General for OJP. OCR is responsible for monitoring civil rights compliance by recipients of financial assistance from OJP and its bureaus.[11] Until October 1994, OCR had responsibility for OJP's internal equal employment opportunity program. According to OCR's Director, OJP transferred this responsibility out of the office to "free the Director and OCR staff from many time consuming EEO duties and . . . allow them more time to focus on compliance reviews and civil rights enforcement issues."[12]

Until the recent addition of new positions along with a tenfold increase in OCR's travel budget,[13] OCR's budget and staffing had not changed significantly since the mid-1980s. Since 1984, OJP has never had more than three staff persons assigned to civil rights enforcement for the Department of

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[7] Ibid., pp. 32–38.

[8] Ibid., p. 39.

[9] Ibid., pp. 46–71.

[10] Ibid., p. 72.

[11] In addition to Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7 (1988), OCR is charged with enforcing the following civil rights statutes and regulations: section 809(c), Omnibus Crime Control and Safe Streets Act of 1968, as amended, Pub. L. No. 90–351, 82 Stat. 197 (codified as amended in scattered sections of U.S.C.); section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988 & Supp. 1993); Subtitle A, Title II of the Americans with Disabilities Act of 1990, codified at 42 U.S.C. §§ 12,101–12,213 (Supp. V 1993); Title IX of the Education Amendments Act of 1972, codified as amended at 20 U.S.C. §§ 1681-1688 (1988); the Age Discrimination Act of 1975, 42 U.S.C. §§ 6101-6107 (1988); section 292 of the Juvenile Justice and Delinquency Prevention Act of 1974, as amended, Pub. L. No. 93–415, 88 Stat. 1109 (codified as amended in scattered sections of U.S.C.); and Department of Justice Nondiscrimination Regulations, 28 C.F.R. Part 42, Subparts C,D,E, and G, and 28 C.F.R. Parts 31, 35 and 39.

[12] OJP FY 1994 Implementation Plan, p. 1; Inez Alfonso-Lasso, Director, Office for Civil Rights, Office of Justice Programs, U.S. Department of Justice, letter to Frederick D. Idler, Acting Assistant Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, Oct. 27, 1994, p. 2 (hereafter cited as Alfonso-Lasso October 1994 letter).

[13] *See* Response to the Report Regarding OJP's Title VI Enforcement, p. 1.

Justice's federally assisted/federally conducted programs.[14] Up until the fall of 1994, OCR's external civil rights enforcement staff consisted of three employees, all located in a central office: the Director of OCR, one civil rights compliance specialist, and a secretary.[15] By contrast, OCR's predecessor, the Office of Civil Rights Compliance of the Law Enforcement Assistance Administration (OCRC) had a professional staff of 16 in February 1975.[16] At that time, the Commission found that "OCRC is understaffed—in fact, the staff resources available are almost inconsequential in comparison to the civil rights problems facing [the Law Enforcement Assistance Administration]."[17]

OJP indicated that the new Assistant Attorney General for the Department of Justice's Civil Rights Division "recognized, as a priority, the OCR Director's proposals to initiate effective Title VI monitoring" and that OJP has made "every effort. . .to find the additional staff and resources necessary to properly perform these responsibilities."[18] As a result, OCR received authorization to hire additional staff members, one of whom began in October 1994, while OCR interviewed candidates for other positions. One of the new staff members will focus on reviewing equal employment opportunity plans submitted by OJP grantees and providing technical assistance to the grantees on the preparation of the plans. Another, a senior civil rights compliance officer, will conduct compliance reviews and onsite complaint investigations, as well as conduct negotiations to secure voluntary compliance.[19] Currently, OCR has a total staff of seven FTEs, which consists of OCR's Director; three senior civil rights compliance officers, all of whom are attorneys; one civil rights compliance specialist; one civil rights assistant; and a secretary. In addition, it receives assistance from two law school volunteer interns.[20]

Despite the recent addition of staff members, OCR does not have sufficient staff to conduct a comprehensive Title VI enforcement program, and OCR probably will be unable to perform more than a superficial enforcement of Title VI. Moreover, one of the new staff members will concentrate on reviewing recipients' equal employment opportunity plans, which do not necessarily cover the broad array of discrimination practices prohibited by Title VI. OCR's workload, in terms of the number of federally assisted/federally conducted programs it oversees, the amount of funding OJP provides, and the number of recipients for whom OCR monitors, is comparable to that of other agencies with small Title VI enforcement programs, such as the Department of Interior. However, it has even fewer resources than other agencies to devote to external civil rights enforcement.

The police hiring supplement program, which provides a large number of grants to local police departments to increase hiring, has contributed significantly to OCR's workload over the past year.[21] OCR's Director indicated that OJP is exploring joint efforts with other Department of Justice civil rights offices as a means of augmenting its resources.[22]

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[14] OJP Survey, Q. 7, p. 18.

[15] OJP FY 1994 Implementation Plan, p. 3. The plan indicates that OCR has four full-time employees, but, according to the director of OCR, the fourth employee, who was responsible for internal civil rights matters, was recently transferred out of OCR. *See* Alfonso-Lasso October 1994 letter, p. 2.

[16] U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974, Volume VI, To Extend Federal Financial Assistance* (November 1975), p. 290.

[17] Ibid., p. 291.

[18] Response Regarding OJP's Title VI Enforcement, attachment 3 to Patrick April 1995 letter, p. 1.

[19] Alfonso-Lasso October 1994 letter, p. 1.

[20] Response to the Report of the U.S. Commission on Civil Rights Regarding OJP's Title VI Enforcement, p. 1. The newly formed Office of Community Oriented Policing Services (COPS) had agreed to detail an attorney on a part-time basis to assist in conducting compliance reviews of COPS grantees, investigating charges and complaints of discrimination, and performing other Title VI civil rights enforcement duties. COPS also intended to assign a part-time staff person to assist in logging and tracking of COPS' grantees, the preparation of letters and notifications of compliance and noncompliance, and the review of equal employment opportunity plans. Alfonso-Lasso October 1994 letter, pp. 1–2. However, that agreement has been rescinded. Response to the Report of the U.S. Commission on Civil Rights Regarding OJP's Title VI Enforcement, p. 1.

According to the current Assistant Attorney General, "When [he] learned last summer that. . .[OJP]. . .had only two professional staff devoted to civil rights compliance for all its funded programs, [he] asked [the Department's Coordination and Review Section (CORS)] staff to begin exploring the possibility of assisting OJP in its Title VI efforts."[23] CORS and OJP staffs later developed a memorandum of understanding that will be signed formally in the near future. Under this agreement, CORS will be responsible for conducting postaward compliance reviews and investigating complaints of discrimination in services on the basis of race, national origin, color, sex, age, and religion in programs funded by OJP. OJP will concentrate on employment discrimination, disability cases, and preaward compliance reviews.[24] The Assistant Attorney General anticipates that in the coming months, CORS staff will initiate "the first Title VI post-award compliance review involving services in a police department since the late 1970's."[25]

OCR has turned not only to the Department of Justice's other civil rights offices for assistance in its civil rights compliance and enforcement efforts, but also to program offices. For example, OCR recently has established a cooperative agreement with the Community Oriented Policing Services (COPS) office whereby OCR extended its civil rights review jurisdiction to thousands of new police departments receiving COPS grants. As a result, OCR and COPS staffs will share many duties, including analysis of data collected, review of equal employment opportunity plans, and the processing of complaints against COPS grantees.[26]

OCR's organizational structure is acceptable. The recent removal of internal civil rights responsibilities from OCR should enhance the office's ability to focus on external civil rights enforcement because now internal civil rights concerns will not direct focus away from external civil rights, particularly Title VI, activities. The Commission recognizes that OJP has delegated some civil rights enforcement responsibilities to CORS and COPS staffs as efforts to improve the overall effectiveness and efficiency of OJP's civil rights enforcement program. However, this structure presents some concerns for ensuring a fully effective Title VI enforcement program. The Coordination and Review Section has responsibility for carrying out the Department of Justice's responsibility for oversight and coordination for the Federal Title VI enforcement effort of the executive departments and agencies. The implications of the memorandum of understanding with OCR make CORS staff responsible for both conducting certain Federal Title VI enforcement activities and overseeing their performance. Furthermore, the use of program office staff to conduct some civil rights compliance and enforcement responsibilities can be problematic. Although OCR may benefit from the program-specific knowledge of COPS staff, these staff will perform their civil rights compliance and enforcement activities in addition to their routine program duties. There is no assurance that program staff will have the knowledge of or skills in specific Title VI compliance and enforcement issues or that they will place adequate priority on these collateral civil rights responsibilities.

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[21] OJP Survey, Q. 12, p. 15.

[22] Inez Alfonso-Lasso, Director, Office for Civil Rights, Office of Justice Programs, U.S. Department of Justice, letter to Frederick D. Idler, Acting Assistant Staff Director, Office for Civil Rights Evaluation, U.S. Commission on Civil Rights, July 11, 1994 (hereafter cited as Alfonso-Lasso July 1994 letter).

[23] Patrick April 1995 letter, p. 2.

[24] Ibid.

[25] Ibid., pp. 2–3.

[26] Responses Regarding OJP's Title VI Enforcement, attachment 3 to Patrick April 1995 letter, pp. 2–3.

## Regulations, Guidelines, Policies, and Procedures

Although OJP's regulations do not reflect recent Title VI developments, they meet most of the requirements necessary to form a sound basis for OJP's Title VI enforcement program. However, OJP's guidelines, policies, and procedures are generally inadequate. OJP maintains that the recent increase in staff will enable OCR "to develop and update policies and procedures as well as guidelines and criteria for analyzing data collected."[27]

### Regulations

OJP has specific Title VI regulations[28] that apply to all of its federally assisted programs. In addition, OJP has special nondiscrimination regulations[29] that apply to recipients receiving financial assistance under the Justice System Improvement Act of 1979 and the Juvenile Justice and Delinquency Prevention Act of 1974, as amended. The nondiscrimination regulations prohibit discrimination on the basis of religion and sex, in addition to the Title VI bases of race, color, and national origin.[30]

OJP's Title VI regulations were originally published on July 29, 1966, and have not been updated since 1981. They contain an appendix listing the Federal financial assistance programs administered by the Department of Justice to which Title VI applies.[31] However, since OCR has not updated OJP's Title VI regulations since 1981, this listing is probably outdated and incomplete. The nondiscrimination regulations were published in 1980. Thus, neither OJP's Title VI or nondiscrimination regulations reflects recent Title VI developments, such as the clarification given by the Civil Rights Restoration Act of 1987 on Title VI's coverage and fund termination.[32]

OJP's Title VI regulations contain a provision that does not appear in the Department of Education's regulations. This provision specifies that any assurance submitted by a government agency applies to the entire agency, and not just the program receiving assistance.[33] However, the regulations allow OJP to exempt a government agency:

> if the applicant establishes . . . that the practices in other agencies of parts or programs of the governmental unit will in no way affect: (1) Its practices in the program for which Federal financial assistance is sought, or (2) the beneficiaries of or participants in or persons affected by such program, or (3) full compliance with the subpart as respects such program.[34]

Specifying that assurances of nondiscrimination apply to an entire governmental unit is an improvement over the regulations of other agencies, which are silent on the matter. OJP's nondiscrimination regulations do not contain these provisions.

Like the Department of Education's regulations, OJP's regulations contain language on termination or denial of Federal financial assistance that is contrary to the Civil Rights Restoration Act. This language limits suspension, termination, or refusal of funds "to the particular political entity, or part thereof, or other applicant or recipient as to whom such a finding has been made and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found."[35] The Civil Rights Restoration Act restored the principle that an agency may terminate funds not only if discrimination is "pinpointed" to the use of those funds, but also if the use of the Federal funds is "infected" with discrimination elsewhere in the operation of the recipient.[36] OJP's Title VI regulations do, however, contain an explanatory "commentary," which states:

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[27] Ibid., p. 1.

[28] 28 C.F.R. Part 42, Subpart C (1994).

[29] *Id.* Subpart D—Nondiscrimination in Federally Assisted Programs—Implementation of section 815(c)(1) of the Justice System Improvement Act of 1979 (hereafter cited in text as "Nondiscrimination regulations").

[30] *Id.* § 42.203(a).

[31] *Id.* Subpart C, Appendix A (1994).

[32] Pub. L. No. 100–259, 102 Stat. 28 (codified as amended in scattered sections of U.S.C.).

[33] *Id.* § 42.105(b).

[34] *Id.*

> if discriminatory employment practices [are found] in a city's police department . . . [OJP] may only suspend that part of the city's payments which fund the police department. [OJP] may not suspend the city's [ ] funds which are used in the city courts, prisons, or juvenile justice agencies.[37]

This explanation is consistent with the explicit provisions of the Civil Rights Restoration Act of 1987. However, it does not clarify that OJP could terminate funds used in the city courts, prisons, or juvenile justice agencies if the discriminatory practices in the police department infected other parts and if a showing of such infection was made.[38]

The Director of OCR indicated that in the view of her office, "there are no conflicts between OJP Title VI regulations and the Civil Rights Restoration Act."[39] OJP recently indicated that since OCR has added three new attorneys to its staff, it has initiated legal analysis of OJP's regulations to ensure compliance with the Civil Rights Restoration Act and that appropriate revisions will be adopted, where necessary.[40] The Commission maintains that both regulatory language and, at a minimum, policy guidance are necessary to accurately inform recipients, programs participants, beneficiaries, and the public generally of the sweeping potential of an agency's fund termination power.

OJP's nondiscrimination regulations provide considerably more detail than the Title VI regulations on procedures for complaint investigations and compliance reviews.[41]

### Guidelines, Policies, and Procedures

OJP has not issued Title VI guidelines, nor has it issued any Title VI policy statements. However, the Department of Justice has issued a "Guide to the Development of an Equal Employment Opportunity Program," which covers recipients' obligations to establish an equal employment opportunity program.[42] Furthermore, OCR recently has prepared draft "Guidelines for Office of Justice Programs Office for Civil Rights Pre-Award Compliance Reviews."[43] The draft guidelines focus on when an applicant should be selected for a preaward compliance review. At least one part of the draft guidelines is inconsistent with the mandate of the Civil Rights Restoration Act. That part specifies that OCR will undertake preaward reviews whenever there are alleged discriminatory practices, but only when the alleged discrimination occurred within the specific program or activity for which the applicant is seeking assistance.[44] Under the Civil Rights Restoration Act, Title VI covers all of the applicant's operations in addition to the specific federally funded program or activity.[45] Therefore, limiting preaward reviews to the specific program for which the applicant is seeking funding violates the spirit of that act. Finally, OCR also is preparing a manual of guidelines for grantees to assist them in attaining compliance and understanding the purpose of compliance reviews.[46]

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[35] *Id.* § 42.108(c).

[36] *See* CRRA Senate Committee Report, p. 20, 1988 U.S.C.C.A.N. 3, 22. See also Board of Pub. Instruction v. Finch, 414 F.2d 1068, 1078-79 (5th Cir. 1969).

[37] *Id.* Part 42, Subpart D, App. A.

[38] *See* discussion of the Act in Chapter 3 of this report.

[39] Alfonso-Lasso July 1994 letter, Q. 4.

[40] Response Regarding OJP's Title VI Enforcement, attachment 3 to Patrick April 1995 letter, p. 1.

[41] *See* 28 C.F.R. §§ 42.205, 42.206 (1994).

[42] OJP Survey, Q. 30, p. 24.

[43] U.S. Department of Justice, Office of Justice Programs, "Guidelines for Office of Justice Programs Office for Civil Rights Pre-Award Compliance Reviews," (draft). The document was provided to the Commission as Attachment C to Alfonso-Lasso July 1994 letter.

OJP's Title VI procedures are limited to what is published in its regulations. The regulations include procedures on complaint investigations, compliance reviews, and effecting compliance, including hearings and decisions and notices. OJP has not issued a detailed procedures manual. However, since the addition of new staff, OCR has begun to research and develop a manual containing uniform criteria and procedures for conducting pre- and postaward compliance reviews, using the Commission's *Compliance Officer's Manual* as a guide.[47] It also developed automated internal procedures that: 1) provide notification to all grantees, at the time of their awards, of their civil rights responsibilities as provided under the assurances; and 2) require grantees to provide OCR with not only equal employment opportunity plans (EEOPs), but also data concerning any consent decrees or judicial findings of discrimination against them, as a term and condition of their grants.[48]

## Process of Title VI Enforcement

OJP's Title VI enforcement effort is inadequate because of its small staff. Although it investigates complaints, it does not perform many other enforcement functions. For example, until recently, it did not conduct any recipient reviews, preaward or postaward. OJP's outreach and education effort is minimal, and it offers almost no technical assistance. However, OCR anticipates that the recent budget and staffing increases will enable the office "to conduct Title pre- and post-award compliance reviews . . . to investigate increased Title VI complaints expected to result from such reviews . . . and . . . to initiate a program of formal technical assistance to OJP recipients."[49]

### Preaward Reviews

Currently, although OJP's nondiscrimination regulations require OJP to perform preaward compliance reviews for all contracts of $500,000 or more,[50] OJP's preaward review process for large contracts is limited to ensuring that recipients submit assurances of nondiscrimination.[51] OJP does conduct desk-audit preaward reviews for its federally assisted programs, but they are limited.[52] Furthermore, the nondiscrimination regulations specifically authorize OJP to place proactive conditions on recipients before releasing funds to them.[53] However, OJP has failed to do so.[54]

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[44] Ibid., p. 3.

[45] Civil Rights Restoration Act of 1987, Pub. L. No. 100–259, 102 Stat. 28 (codified as amended in scattered sections of U.S.C.).

[46] Responses Regarding OJP's Title VI Enforcement, attachment 3 to Patrick April 1995 letter, p. 3.

[47] Ibid., p. 2.

[48] Ibid.

[49] Response Regarding OJP's Title VI Enforcement, attachment 3 to Patrick April 1995 letter, p. 1.

[50] 28 C.F.R. § 42.206(a)(1) (1994).

[51] OJP FY 1994 Implementation Plan, p. 5. OJP's survey response reports that OJP conducted such checks on 272 contracts in 1993. OJP Survey, Q. 19(e), p. 20.

However, OCR recently began implementing a preaward review program for the police hiring supplement program (PHSP), which was established in 1993. As a condition for receiving a grant under the program, applicants must submit data on their employment practices and delivery of services, as well as data concerning any consent decrees or court findings of discrimination against them. This special condition is "placed on all grants wherein the grantee acknowledges that 'failure to provide the data requested is a violation of [the] agency's Assurances and may result in prohibition of drawdown of funds.'"[55] OCR indicated that the collection of data as required through this special condition has proved to be highly successful under the police hiring supplement program and, therefore, was adopted in the first phase of the community oriented policing services (COPS) grant program.[56]

### Postaward Reviews

OCR does not perform either postaward desk-audit reviews or postaward onsite compliance reviews.[57] According to OCR's Director, OCR did not have the resources to conduct postaward reviews.[58] However, she wrote:

> Although OCR has not conducted compliance reviews during past administrations, the present Attorney General is committed to a reinvigoration of civil rights enforcement, including Title VI. . . . The Acting Assistant Attorney General for OJP, who took office in August 1993, has given full support to OCR's Title VI enforcement efforts and is committed to finding the resources we need to get the job done.[59]

The recent addition of a senior civil rights compliance officer to OCR demonstrates the increased support given to OCR's Title VI enforcement efforts. However, it may not increase the staff resources enough to ensure an effective compliance review process.

As indicated above, CORS and OCR staffs recently have developed a memorandum of understanding to address this problem. Once the memorandum is formally accepted and signed, CORS will be responsible for conducting Title VI postaward compliance reviews, and OJP will concentrate on employment discrimination and Title VI preaward compliance reviews.[60] This arrangement is sensible in light of OJP's activity in the employment discrimination area. Specifically, although OCR does not conduct postaward Title VI reviews, OCR does conduct equal employment opportunity plan reviews of many State and local government recipients. These EEOPs reveal grantees' employment practices. Furthermore, OCR indicated that it developed a streamlined method to review EEOPs, producing more efficient assessments of EEOPs with a focus on identifying problem jurisdictions for prospective compliance reviews.[61] However, the transfer of postaward compliance review activities to CORS staff will create a conflict with their existing oversight responsibilities for Federal Title VI enforcement.

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[52] OJP FY 1994 Implementation Plan, p. 5.

[53] 28 C.F.R. § 42.206(b) (1994).

[54] Inez Alfonso-Lasso, Director, Office for Civil Rights, Office of Justice Programs, U.S. Department of Justice, interview in Washington, D.C., Mar. 17, 1993 (hereafter cited as Alfonso-Lasso interview).

The Department of Justice regulations state:

> "The Office shall review selected formula, discretionary, and national priority applications for $500,000 or more in order to determine whether the application presents a possibility of discrimination in the services to be performed under the grant, or in the employment practices of the applicant. In those instances where it finds such a possibility, the Office shall special condition, disapprove or take other action with respect to the application to assure that the project complies with section 815© of the JSIA [Justice System Improvement Act of 1979]."

[55] Response Regarding OJP's Title VI Enforcement, attachment 3 to Patrick April 1995 letter, p. 2.

[56] Ibid.

[57] OJP FY 1994 Implementation Plan, p. 5. *See also* OJP Survey, Q. 22, p. 21; Q. 32, p. 24; Q. 34, p. 25.

[58] Alfonso-Lasso July 1994 letter, Q. 7.

[59] Ibid., Q. 1.

OCR improved its postaward compliance process in other areas. It automated new internal OCR review procedures that reduce routine logging, tracking, filing, and reviewing processes that currently impede the compliance specialists from performing compliance reviews and investigations.[62] The automated program includes a letter sent to all grantees, at the time of their award, explaining their obligations under the assurances they provide and requesting the submission of an EEOP when the application is for more than $500,000 in assistance.[63]

### Complaint Investigations

In OJP's 1991 Civil Rights Implementation Plan, OJP acknowledged that there had been a "stagnation of complaint investigations, which are severely backlogged."[64] Since then, OJP has reduced a severe and growing backlog in processing complaints. The backlog of civil rights complaints for all federally assisted/federally conducted programs increased from 18 at the end of 1990, to 29 in 1991, to 47 in 1992, but declined to 26 at the end of 1993.[65] OJP's 1994 Civil Rights Implementation Plan states that "[t]he entire backlog of complaints has been eliminated through onsite investigations or successful negotiations to secure voluntary compliance."[66] OJP indicated that this success was the result of a new process that allowed respondents to be heard before onsite investigation and that resulted in voluntary compliance in all cases.[67] Furthermore, OCR has begun to conduct joint complaint investigations with the Department of Justice's Coordination and Review Section and will shortly conduct a joint investigation with the Civil Rights Division's Special Litigation Section.[68]

The majority of complaints OJP receives are from prison inmates,[69] and very few are Title VI complaints. Nonetheless, OJP is receiving an increasing number of Title VI complaints. In 1993, OCR received 13 Title VI complaints, out of a total of 44 complaints,[70] compared to 9 Title VI complaints in 1992, and only 2 such complaints in 1988. Of the 13 Title VI complaints received in 1993, OJP had investigated 8 with no-cause findings reached and 5 with decisions pending.[71] OJP has not issued a "cause" finding on any Title VI case since 1988,[72] which may indicate that OCR is conducting its complaint investigations in a cursory manner and is overlooking legitimate claims of discrimination.

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[60] Patrick April 1995 letter, p. 2.

[61] Responses Regarding OJP's Title VI Enforcement, attachment 3 to Patrick April 1995 letter, p. 2.

[62] Ibid.

[63] Alfonzo-Lasso October 1994 letter, p.2. *See also* Response Regarding OJP's Title VI Enforcement, attachment 3 to Patrick April 1995 letter, p. 2.

[64] U.S. Department of Justice, Office of Justice Programs, "Fiscal Year 1991 Civil Rights Implementation Plan," p. 10 (hereafter cited as OJP FY 1991 Implementation Plan).

[65] *See* U.S. Department of Justice, Office of Justice Programs, "Fiscal Year 1990 Civil Rights Implementation Plan;" OJP FY 1991 Implementation Plan; U.S. Department of Justice, Office of Justice Programs, "Fiscal Year 1992 Civil Rights Implementation Plan;" U.S. Department of Justice, Office of Justice Programs, "Fiscal Year 1993 Civil Rights Implementation Plan;" OJP FY 1994 Implementation Plan, Workload and Performance Data for 1990–1993.

[66] OJP FY 1994 Implementation Plan, p. 11.

[67] Ibid.

[68] Alfonso-Lasso July 1994 letter.

[69] Alfonso-Lasso interview.

### Deficiencies, Remedies, and Sanctions

Until recent improvements in its civil rights compliance and enforcement processes, OJP had not found deficiencies and, therefore had not negotiated remedies or imposed sanctions. However, through its preaward compliance review program implemented for the police hiring supplement program, OCR effectively blocked at least one PHSP applicant's grant award based on civil rights noncompliance grounds. OCR was successful in its negotiations to secure a favorable voluntary compliance agreement with the applicant. As with this new preaward compliance review program, OJP is taking advantage of the strong sanctions that Title VI allows to improve its Title VI compliance and enforcement program. For example, OJP imposes a data reporting requirement on grantees, enhancing its preaward desk-audit process, and a violation of that requirement "may result in prohibition of drawdown of funds."[73]

### Outreach, Education, and Technical Assistance

OJP has not attempted broad outreach and education to inform the public of their rights under Title VI. OJP's outreach and education activities are limited to the publishing of program announcements by the Bureau of Justice Assistance through various publications and to responding to inquiries.[74] OJP does offer technical assistance to State and local agency staff upon request only, but generally does not provide technical assistance or training to recipients.[75] To the extent that it offers technical assistance, it focuses on the Americans with Disabilities Act, not Title VI.

However, OCR indicated that grantees under the police hiring supplement program have been requesting ongoing technical assistance by telephone. As a result of these requests, OCR has prepared a draft seven-step guide to the design and development of an equal employment opportunity plan, which will be disseminated to all grantees with their civil rights approval letter.[76] Furthermore, in December 1994, the Director of OCR made a presentation at the annual Bureau of Justice Assistance's regional conference of formula grantees on civil rights responsibilities and OJP's reinvigorated emphasis on civil rights compliance. Approximately 300 grantee representatives attended the presentation.[77] OJP indicated that because OCR now has trained staff available to provide technical assistance, it anticipates OCR's continued participation and instruction at similar conferences for other bureaus in the future.[78]

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[70] OJP Survey, Q. 36, p. 26.

[71] Ibid., Q. 38, p. 27.

[72] Ibid.

[73] *See* Responses Regarding OJP's Title VI Enforcement, attachment 3 to Patrick April 1995 letter, p. 2.

[74] OJP Survey, Q. 23, p. 22.

[75] Ibid., Q. 27, 29, p. 23.

[76] Alfonso-Lasso October 1994 letter, p. 2. A copy of the draft guide was submitted with the letter.

[77] Ibid. *See also* Responses Regarding OJP's Title VI Enforcement, attachment 3 to Patrick April 1995 letter, p. 3.

[78] Responses Regarding OJP's Title VI Enforcement, attachment 3 of April 1995 letter, p. 3.

## Oversight of Continuing State Programs

Although OJP does provide funds through continuing State programs, OCR does not ensure that States fulfill their regulatory obligations[79] of providing statements of compliance with Title VI and establishing methods of administration for ensuring compliance. Moreover, it does not make any other attempt to evaluate States' Title VI compliance.

OJP does require many State and local government agency recipients to develop equal employment opportunity plans, and OCR conducts postaward reviews of these plans. In each of the past 2 fiscal years, OCR conducted more than 50 EEOP reviews, and because OCR intends to conduct EEOP reviews for all applicants to the police hiring supplement program, OCR's Director estimated that OCR would conduct more than 207 EEOP reviews in 1994.[80]

The EEOP reviews, which take approximately 4 hours to complete, ensure that the EEOP includes a narrative statement setting forth the agency's equal employment opportunity policy; detailed work force statistics broken down by race, national origin, sex, and job category; an analysis of these statistics in comparison to community labor force statistics; and specific goals and steps for addressing underutilization if it exists. OCR indicated that it rejects approximately 65 percent of the EEOPs for nonresponsiveness.[81] However, because the EEOPs are limited to equal employment opportunity issues, they are not sufficient to ensure compliance with Title VI.

## Staff Training

One of OJP's major activities has been the training of its new staff.[82] More recently, OCR has provided OJP grant managers with technical assistance and information on the Americans with Disabilities Act to assist them in addressing the high volume of requests received from their grantees for such information.[83] OJP's 1994 Civil Rights Implementation Plan indicates that OCR's Director and equal opportunity specialist each received some civil rights training during 1993, but the training did not address Title VI.[84] Furthermore, OCR indicated that in 1994, OJP offered, for the first time, agencywide training for grant managers to educate them on the requirements of Title VI and allow them to become an integral part of OJP's civil rights enforcement effort.[85]

OCR has plans for other staff training. As indicated above, OCR has begun researching and developing procedures and criteria for performing pre- and postaward compliance reviews. It intends to conduct training sessions once these procedures and criteria are complete.[86]

## Data Collection and Analysis

Aside from the requirement that State and local agencies maintain EEOPs, and the data required of applicants for assistance under the police supplement hiring program, OCR does not systematically collect and analyze data on applicants or recipients. However, the type of data required from these two sources is useful for pre- and postaward desk-audit reviews. Under the police supplement hiring program, OCR collects data that include grantees' prior histories of discrimination, specifically, any consent decrees or judicial findings of discrimination against them.[87] Furthermore, OCR developed draft criteria by which to conduct analyses of all data collected under the police hiring supplement program. According to OJP, these criteria will enable OCR to assess and find possible civil rights problems and to recommend action concerning which grantees may require onsite postaward reviews.[88]

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[79] 28 C.F.R. § 42.105(d) (1994).

[80] Alfonso-Lasso July 1994 letter, Q. 9.

[81] Ibid.

[82] OJP FY 1994 Implementation Plan, p. 9.

[83] Ibid., p. 5.

[84] Ibid., pp. 9–10.

[85] Alfonso-Lasso October 1994 letter, p. 3.

[86] Responses Regarding Title VI Enforcement, attachment 3 to Patrick April 1995 letter, p. 2.

## Civil Rights Implementation Plans and Planning

The Commission reviewed OJP's Civil Rights Implementation Plans for 1991 through 1994. The 1991 plan is a base-line plan for the period 1991 to 1993, and the subsequent plans, including the 1994 plan, are updates.

Although OJP's Civil Rights Implementation Plans follow the outline provided by the Department of Justice, they reveal that OJP did little to enforce civil rights laws, including Title VI. In 1991, OJP established as a long-range goal "ensur[ing] that recipients of OJP agency funds comply with all civil rights laws and regulations in a consistent fashion," but to do so chose the limited strategy of conducting preaward reviews and investigating complaints. The goals do not include conducting postaward reviews, collecting data from recipients, or improving education and outreach.[89] The limited goals in the 1991 plan evidence an inadequate Title VI enforcement program and indicated no intentions of OJP to improve it. The only other objectives reported by OJP were the revision of the regulations, improved technical assistance to recipients, and completion of delegations of authority, none of which OJP had accomplished by 1994.

Over the next several years, OJP completed complaint investigations in a timely manner but did little else. It was not until the 1994 plan that OJP proposed to initiate postaward compliance reviews and indicated that it requested additional staff to do so.[90] OJP acknowledged that "[t]he conduct of post-award compliance reviews, as well as pattern or practice reviews . . . is mandated by statute."[91] The 1994 plan also lists the provision of civil rights training to OJP program managers as one of OJP's long-range goals.[92] However, the 1994 plan does not indicate any plans to collect data from recipients or to enhance OJP's outreach and education.

The 1994 plan implicitly acknowledged that OJP had not actively fulfilled its statutory mandate to enforce civil rights laws pertaining to federally assisted and federally conducted programs by its statement that "[t]he major objective of OCR is to once again become active in effectively monitoring the civil rights compliance of recipients of OJP funding."[93]

Since 1994, OJP has made some improvements to its Title VI enforcement program, as discussed above. Planning efforts have been no exception. OCR's Director is operating under a Strategic

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[87] Responses Regarding OJP's Title VI Enforcement, attachment 3 of Patrick April 1995 letter, p. 2.

[88] Ibid., p. 1.

[89] OJP FY 1991 Implementation Plan, pp. 9–10.

[90] Ibid., p. 10.

[91] Ibid., p. 11.

[92] Ibid., p. 10.

[93] Ibid., p. 11.

Plan for the office. One short-term goal focused on the training of grant managers, and in August and September 1994, OJP instituted and completed mandatory agencywide training of grant managers.[94] Another short-term goal was the development of a civil rights desk manual for grant managers. OJP indicated that it authorized a draft that is ready for issuance.[95] As a long-term goal, OCR intends to utilize regional conference forums to train grantees on their responsibilities under Title VI and the OJP program statute. As indicated above, in December 1994, OCR's Director made a presentation on civil rights responsibilities to 300 of the Bureau of Justice Assistance State formula grantees.[96] Finally, OCR intends to develop and provide guidelines for grantees on their requirements under Title VI and other civil rights-related statutes and is currently preparing such a manual.[97]

## Findings and Recommendations

### Organization, Budget, Staffing, and Workload of OJP's Civil Rights Enforcement Function

#### Organization

**Finding:** The Office of Justice Programs' (OJP) Office of Civil Rights (OCR) is headed by a Director who reports directly to the agency administrator, the Deputy Assistant Attorney General for OJP.[98] This reporting structure does not necessarily ensure a fully effective Title VI enforcement program. It does not guarantee that important issues relating to OJP's civil rights enforcement programs, such as budget and staffing needs, will receive adequate and prompt attention when imperative or that civil rights enforcement will be a prominent concern throughout OJP.

**Recommendation:** The Commission recognizes that OJP's reporting arrangement may exist to promote a manageable supervision and reporting of day-to-day activities. However, this structure should ensure that OCR's Director is actively involved in OJP's budget process, in order to encourage the procurement of funding to support and achieve OCR's mission.

**Finding:** Within the last year, OJP has made efforts to improve OCR's organizational structure and staff assignments in ways that promote external civil rights enforcement. In October 1994, OJP removed from OCR responsibility for OJP's internal equal employment opportunity program, enabling it to concentrate more resources and activities on external civil rights enforcement. OCR and CORS staffs recently developed a memorandum of understanding that will assign CORS staff members some external civil rights compliance and enforcement responsibilities. OCR and one program office entered a cooperative agreement in which some program office staff will perform some external civil rights compliance and enforcement activities.[99] OCR's sharing of responsibility with CORS and program staff will hinder the overall effectiveness of Title VI enforcement. Since CORS is already responsible for oversight of all Federal agencies' Title VI enforcement efforts, its performance of OJP's compliance and enforcement efforts means that it must oversee itself. Furthermore, program office staff will perform their civil rights enforcement activities as a collateral duty to their preexisting program office responsibilities. Program office staff will not necessarily have the civil rights expertise or place proper attention to civil rights duties to ensure that Title VI is proper complied with and enforced.

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[94] Responses Regarding OJP's Title VI Enforcement, attachment 3 of Patrick 1995 letter, p. 3.

[95] Ibid.

[96] Ibid.

[97] Ibid.

[98] *See* pp. 479–80.

[99] *See* pp. 478–80.

**Recommendation:** OJP should maintain the separation of internal and external civil rights enforcement functions. This structure will allow OCR to concentrate on improving its Title VI enforcement program. The Commission recognizes that OJP may have delegated some of its civil rights enforcement responsibilities to other offices in order to promote a more efficient civil rights enforcement process and to provide sorely needed improvements to the existing external civil rights enforcement program. The Commission maintains that to ensure OJP's Title VI enforcement program is fully effective, OJP should not delegate Title VI enforcement responsibilities to these offices, but rather focus on improving OCR. CORS staff should not have responsibilities for enforcing Title VI in OJP's Federal financial assistance program. CORS staff must concentrate on improving its preexisting role of overseeing and coordinating the governmentwide Federal Title VI enforcement effort. The reliance on some program staff for Title VI enforcement is less problematic although of concern. OJP should ensure that these staff members place sufficient emphasis on their civil rights responsibilities by holding them strictly accountable for those duties. Furthermore, OCR should see that these program staff receive thorough training on the civil rights law that they will be enforcing as well as the activities they are expected to perform.

### Budget, Staffing, and Workload

**Finding:** Recently, OJP also addressed OCR's staffing and budget needs. It expanded OCR's travel budget tenfold, and it increased OCR staff from three to seven with the addition of four professional staff members.[100] The presence of legal support staff within OCR will enable it to conduct necessary legal analysis on OJP's regulations and draft revisions or updates of the regulations when necessary. However, the increase in staff does not exceed the staffing levels of OCR's predecessor, OCRC, during the 1970s.

**Recommendation:** Because the Commission does not support OCR's sharing of civil rights enforcement responsibilities with CORS staff, it recommends that OJP compensate for abandoning this arrangement by increasing OCR's staff. However, if acquiring adequate staffing and resources is unrealistic, OCR must devote the resources it has to more efficient, proactive enforcement mechanisms, such as thorough preaward desk-audit reviews—to avoid even funding discriminating organizations; technical assistance—to empower recipients to comply voluntarily; and requiring recipient self-evaluations as part of their grant contract obligations. In addition, in State-administered assistance programs, OCR should delegate to State staff actual implementation and enforcement activities, such as compliance reviews, complaint investigations, technical assistance, leaving only oversight and monitoring responsibilities for OCR's limited staff.

## Regulations, Guidelines, Policies, and Procedures

### Regulations

**Finding:** OJP's Title VI regulations and the accompanying appendix that lists Federal financial programs administered by the Department of Justice have not been updated since 1981.[101] As such, they do not reflect recent Title VI developments, such as the implications of the Civil Rights Restoration Act of 1987 for Title VI's coverage and fund termination. OJP's current Title VI provision on fund termination or suspension limit the effect to the particular program, or part thereof. The explanatory commentary is helpful in applying a concrete program-related illustration to the issue of fund termination. However, neither the provision on fund termination nor the commentary acknowledges the Civil Rights Restoration Act's restoration of the principle that an agency may terminate funds not only if discrimination is pinpointed to the use of those funds, but also if the use of the funds infects other parts or the entire institution. OJP also has special nondiscrimination regulations that apply to recipients receiving financial assistance under the Justice System Improvement Act of 1979 and the Juvenile Justice and Delinquency Prevention Act of 1974. These regulations were published in 1980 and, thus, also do not reflect recent Title VI developments, such as the Civil Rights Restoration Act of 1987.

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[100] *See* p. 480.

[101] *See* pp. 482–83.

**Recommendation:** OCR must add to the definitional section of OJP's Title VI and nondiscrimination regulations the meaning of "programs and activities" as clarified by the Civil Rights Restoration Act, specifying that Title VI applies to the entire institution or agency even if only one part or program receives Federal funds. OCR also must clarify the fund termination language in the Title VI and nondiscrimination regulations and commentary to recognize that OJP may suspend or terminate funds to all parts or agencies infected with discrimination of a program recipient if a showing of infection is made. As an alternative, OJP at a minimum should issue guidelines and policy statements reflecting these issues.

**Finding:** The nondiscrimination regulations broadly prohibit employment discrimination in all programs covered under the regulations, regardless of whether their purpose is to provide employment. OJP's nondiscrimination regulations also provide considerably more detail than the Title VI regulations on procedures for complaint investigations and compliance reviews.[102]

**Recommendation:** OJP should make its nondiscrimination regulations applicable to all of its federally assisted programs and activities. One set of current and thorough regulations applicable to each type of program OJP funds would better facilitate OCR's ability to implement and enforce Title VI uniformly and comprehensively. However, OJP should ensure that these combined regulations contain all elements necessary for an effective Title VI enforcement program. For example, if the unified regulations have provisions on requirements for recipients and applicants or procedures, the provisions should clearly specify whether all or some apply to Title VI. Accurate references will ensure that recipients and applicants fully understand their Title VI rights and responsibilities. If OJP continues to maintain the separate regulations, its Title VI regulation should be updated and improved to emulate the more comprehensive nondiscrimination regulatory provisions, especially respecting detailed procedures for conducting enforcement mechanisms, such as complaint investigations and compliance reviews.

### Guidelines

**Finding:** OJP has not issued Title VI guidelines. However, OCR has issued a "Guide to the Development of an Equal Employment Opportunity Program," prepared draft "Guidelines for Office of Justice Programs Office for Civil Rights Preaward Compliance Reviews," and is preparing a manual of guidelines to grantees to facilitate understanding of compliance and compliance reviews.[103]

**Recommendation:** OJP should ensure that its draft guidelines meet the standards imposed by the Department of Justice. Specifically, the Department of Justice requires a set of guidelines for each type of federally assisted program OJP administers. Each set must accomplish the following: (1) Explain the exact nature of OJP's Title VI requirements. For example, the Office for Victims of Crime administers programs that provide technical assistance and training to criminal justice attorneys or sponsor conferences for these attorneys, medical and health personnel, and other individuals who work with crime victims. Title VI would address whether individuals are denied opportunities to receive training or attend conferences because of race, ethnicity, or national origin. The Office of Juvenile Justice and Delinquency Prevention provides grants to States that support delinquency prevention programs. Therefore, if Federal funds assisted in the building of a youth recreational facility under this program, Title VI would cover discrimination in choosing the site of that facility, in selecting contractors to build the facility, in hiring and maintaining a work force for that facility, and in providing services to youth and others in that building. (2) Specify methods for Title VI enforcement. For example, programs that fund the construction of juvenile detention or youth recreational facilities necessitate thorough preaward compliance reviews. A preaward intensive review process for this program enables OCR to identify actual or potential noncompliance with Title VI before the building process begins. Otherwise, remedying discrimination in siting decisions or the selection of construction contractors may be difficult at the postaward stage. (3) Provide examples of practices prohibited by Title VI in the context of each particular type of funding program OJP administers. With the technical assistance and training programs, Title VI proscribes the denial of opportunities to participate. Other practices would include separate treatment of or different standards of participation for individuals in a federally funded rehabilitation program for adult or youth offenders on the basis of race, ethnicity, or national origin. (4) Set forth required or recommended remedial action. In the case of separate treatment or different standards of participation for individuals in a rehabilitation program, the recommended remedy would include requiring equal treatment or equal opportunities to participate. However, OCR also should require some type of followup reporting mechanism for that specific program to ensure that all instances of noncompliance or discrimination are discontinued. (5) Describe "the nature of requirements relating to covered employment, data collection, complaints, and public information." The guidelines must also set forth and explain the process for data collection from funding recipients, including instructions and specific examples concerning the type of data and information that must be maintained by recipients and applicants. They also should address requirements for public education and community outreach related to the nondiscrimination mandate of Title VI.

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[102] *See* p. 483.

[103] *See* p. 483.

OJP also should develop Title VI guidelines that specifically address State continuing programs. They should establish methods of administration or requirements for States assuming Title VI compliance responsibility for OJP's ultimate funding recipients, and ensure that recipients conduct self-assessments of their compliance status and take action to remedy any deficiencies discovered. In addition, such guidelines should include definitive implementation, compliance, and enforcement standards and procedures for the States assuming Title VI responsibility, including, for example, detailed investigative methods and remedial action procedures.

### Policies

**Finding:** Despite Federal agencies' responsibility to issue appropriate Title VI directives in the nature of policy guidance, OJP has not issued any Title VI policy statements.[104]

**Recommendation:** OJP must also commence regularly developing policies concerning Title VI implementation and enforcement and communicating such policies to its external civil rights staff and funding recipients. Such policies should be aimed at providing civil rights enforcement staff and funding recipients with a complete understanding of the meaning and intent of Title VI compliance relative to the specific programs OJP administers, including statements defining OJP's regulatory intent and elaborating its standards for recipient compliance. In particular, OJP should issue policy directives concerning the following: 1) procedural issues particular to State-administered programs, such as drug control and system improvement, juvenile justice, victims' compensation, and victims' assistance; and 2) legal issues related to Title VI enforcement, such as victim compensation payments constitute direct assistance payments, thereby exempting them from Title VI's coverage. In addition, OCR should regularly develop policy statements on emerging and changing legal issues affecting

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[104] *See* p. 483.

Title VI compliance, such as changes in case decisions, amendments to statutes, and revisions in regulations or policies affecting Title VI compliance. For example, through policy statements, OCR should clarify all implications of the Civil Rights Restoration Act of 1987 on Title VI coverage and fund termination.

### Procedures

**Finding:** OJP's Title VI procedures are limited to those published in its regulations. These procedures are general and do not provide step-by-step instructions.[105] They are not as helpful in informing OCR staff of their specific duties with respect to compliance reviews, complaint investigations, performance evaluations of State Title VI compliance and enforcement efforts, collection and analysis of data, and provision of outreach, education, technical assistance, and staff training. However, OCR has begun developing a manual of criteria and procedures for conducting preaward and postaward compliance reviews.

**Recommendation:** OCR must complete this manual for conducting compliance reviews. It should produce this manual and others so that Title VI enforcement staff and funding recipients will have step-by-step instructions for implementing Title VI, from the application and preaward process through compliance review and complaint processing, in each type of program OJP sponsors. This is especially important for State-administered programs, which are prevalent among OJP-funded programs. Since those programs are actually managed by State and local recipients, they involve special and more complicated enforcement issues related to OCR's oversight and monitoring of States' Title VI implementation efforts. It is critical that both OCR staff and State recipients understand how to conduct the Title VI enforcement mechanisms particular to such programs.

## Process of Title VI Enforcement

### Preaward Reviews

**Finding:** Although OJP's nondiscrimination regulations require OJP to perform preaward compliance reviews for all contracts of $500,000 or more, OJP limits its preaward review of those contracts to ensuring that recipients submit assurances of nondiscrimination.[106] Furthermore, OJP failed to establish proactive conditions on recipients before releasing funds, despite authorization through the nondiscrimination regulations. OJP conducts limited desk-audit preaward reviews for its other federally assisted programs although it recently implemented a preaward compliance review program in one of its funding programs. This review program requires that, as a condition for receiving a grant, applicants submit demographic data respecting employment practices and delivery of services in the administration of their federally funded programs and activities, as well as data concerning any consent decrees or judicial findings of discrimination against the applicants. OCR plans to expand this preaward review compliance program to another federally funded program.

**Recommendation:** The Department of Justice requires that every agency determine in writing whether each applicant for Federal financial assistance is in compliance with Title VI prior to granting assistance. Agencies are also required to review data submitted by each applicant—any and as much information necessary to determining the applicant's compliance status. Preaward reviews of such applicants are necessarily designed to be more thorough than merely collecting assurance forms. They are better designed to determine fully recipients' Title VI compliance status and to eliminate discriminatory practices before disbursing public funds and before such practices adversely affect potential and actual assistance program beneficiaries. OCR must commence conducting preaward reviews of all grant applicants, in addition to securing and evaluating assurances of nondiscrimination. It should continue placing data requirements as a precondition to receiving a grant, and it should apply this precondition to all OJP programs.

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[105] *See* p. 484.

[106] *See* pp. 484–85.

Preaward reviews should be aimed at identifying discriminatory practices in the delivery of program services based upon evidence, such as unequal participation rates. Preaward reviews should necessarily involve an examination of documents related to a recipient's administration of a particular Federal program. For example, the Bureau of Justice Assistance uses discretionary grants to provide State and local criminal justice agencies with training and technical assistance on state-of-the-art information on innovative programs and strategies. Preawards of this program should consider racial and ethnic data on the work forces of those agencies, plans or criteria that the agencies intend to use in selecting individuals for training, past discrimination complaints against the agencies with findings of causes, as well as pending complaints.

For certain types of Federal assistance programs, preaward compliance reviews should receive emphasis and deserve particular attention and detail. For example, through the National Institute of Justice's drug control and antidrug-abuse programs and the Office of Juvenile Justice and Delinquency Prevention's programs, Federal funds may support the construction of a drug rehabilitation center, drug abuse prevention clinic, youth recreational center, or juvenile justice facility. A postaward review process will be unable to remedy completely a discriminatory siting decision for the facility or other discriminatory practice in the building process once construction begins. Thorough preaward reviews that identify existing and potential areas of noncompliance will prevent discriminatory practices from reaching and affecting actual and potential beneficiaries.

**Recommendation:** The Commission concurs with the Department of Justice that preaward reviews, both desk audit and on site, are essential to an effective Title VI enforcement program and, therefore, OCR should conduct them on all OJP program applicants and recipients. However, the Commission recognizes the budget and staffing limitations of OJP. It realizes that, with continuing emphasis on downsizing and restructuring the Federal Government and maintaining fiscal responsibility, OCR may be unable to acquire additional staff to strengthen fully all aspects of OJP's Title VI implementation, compliance, and enforcement program. The Commission also understands that a lengthy preaward process will delay program benefits and, in effect, adversely impact on ultimate beneficiaries. In light of these factors, the Commission recommends some alternative strategies that will promote a meaningful and efficient preaward process on as many applicants and recipients as possible, eliminating reliance on cursory preaward reviews. These strategies should serve only as a secondary alternative to the optimal preaward compliance review process described above. Although this alternative may not be the most effective at ensuring full enforcement of Title VI, it should allow agencies to have some type of meaningful preaward review mechanism without critically impacting on Title VI enforcement. (See p. 485 of this chapter.)

### Postaward Reviews

**Finding:** OCR does not perform either postaward desk-audit reviews or postaward onsite compliance reviews, due to insufficient resources. OCR does conduct equal employment opportunity plan reviews of many State and local government recipients; however, since these EEOPS are limited to grantees' employment practices, they do not incorporate the information necessary for determining compliance with Title VI.[107] OCR has improved postaward compliance process with automated internal review procedures aimed at reducing routine manual processes that delay compliance investigations. This computer program sends letters to all grantees, at the time of an award, explaining the grantees' civil rights compliance obligations.

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[107] *See* p. 485.

**Recommendation:** The Department of Justice requires that agencies establish a postaward compliance review process. To meet that requirement, OCR should, given present staffing levels, utilize postaward desk-audit reviews to ensure continuing recipient compliance with Title VI. Furthermore, it should review more than EEOPs. OJP's postaward desk audit reviews should be designed to accomplish the following: 1) identify deficiencies in recipients' delivery of program services to potential and actual participants and beneficiaries of all races and ethnicities; 2) investigate allegations of discriminatory barriers to participation; 3) evaluate recipients' public education about program accessibility; and 4) identify recipients needing technical assistance or further onsite investigation. The reviews should also be designed to fit each particular type of OJP funding program, including State-administered programs. The results of a post-award review must be in writing and must include specific findings and recommendations for achieving compliance. As with preaward reviews, postaward desk-audit reviews would necessarily be limited to documentary evidence concerning recipients administration of Federal programs. The same types of documents and material could be examined.

In addition, to the extent feasible, OCR should conduct onsite compliance reviews of its grant recipients' facilities, or, at least those identified to be in noncompliance by desk-audit reviews. First, the recipient's facility should be thoroughly investigated to identify potentially discriminatory staffing patterns or other potentially discriminatory employment or service practices. Second, OCR staff should interview funding recipient officials, communities affected by the recipient's programs or activities, program participants or beneficiaries, and counselors or interviewers responsible for assisting participants' and program beneficiaries' involvement. Third, compliance policies and practices should be carefully ascertained and examined. Fourth, statistical evidence regarding participation rates should be examined, as well as statistical evidence on application rejection rates. Fifth, applications, or other interview materials, for assistance should be examined to detect possible barriers to participation, such as discriminatory criteria (either intentional or in effect). Sixth, efforts to educate the public and affected community about programs and activities should be evaluated, especially efforts to provide program accessibility information to limited-English-speaking communities or otherwise disadvantaged communities. Each review must be designed to fit the particular type of program at issue. To effectuate a comprehensive compliance review system, civil rights staff must be trained to conduct onsite compliance investigations. Because OCR has such limited staff and resources, those procedures involving the examination of documentary material should be accomplished by the preliminary desk-audit investigation.

### Complaint Investigations

**Finding:** Since 1992, OJP has reduced a backlog in processing complaints, which had increased dramatically between 1990 and 1992.[108] The backlog was eliminated through onsite investigations and negotiations for voluntary compliance.

**Recommendation:** OJP should continue its use of onsite investigations and negotiations for voluntary compliance. However, it should ensure that followup mechanisms are in place to ensure that a recipient or grantee who agrees to comply voluntarily does so.

### Deficiencies, Remedies, and Sanctions

**Finding:** Until recently, OJP had negotiated no remedies and imposed no sanctions.[109] Through its recently implemented preaward compliance review program, it effectively blocked a grant award to one program applicant based on civil rights noncompliance and, through negotiations, secured a voluntary compliance agreement.

**Recommendation:** As mentioned above, OJP must implement followup procedures to ensure that recipients and grantees fulfill their agreements voluntarily to reach compliance with Title VI.

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[108] *See* p. 486.

[109] *See* p. 487.

### Outreach, Education, and Technical Assistance

**Finding:** OJP's community outreach and public education activities are limited to publishing program announcements in various publications and responding to inquiries.[110] These limited efforts impede an effective Title VI enforcement program. Because a strong and active outreach and education approach informs program participants, actual and potential beneficiaries, affected communities, and the public generally of their rights under Title VI, it encourages the filing of legitimate complaints of discrimination under Title VI and reduces the receipt of frivolous claims.

**Recommendation:** Regarding community outreach, OCR needs regularly to solicit comments and suggestions from affected communities and funding recipients on its Title VI enforcement efforts. It also should solicit information on affected communities' civil rights concerns about protection of Title VI rights, and funding recipients' compliance concerns about potential Title VI violations and agency compliance expectations. Regarding public education, OCR need sto actively and regularly inform potential and actual participants, beneficiaries, and affected communities concerning the extent of their rights and how to pursue and protect their rights, including procedures for filing complaints. OCR also should ensure that recipients educate the public regarding program accessibility.

**Finding:** In the past, OJP's efforts at providing technical assistance were minimal. It offered technical assistance to State and local agency staff upon request only and did not provide technical assistance or training to other recipients' staff.[111] Within the past year, OJP has increased its emphasis on affording technical assistance to grantees and recipients, but these efforts have not focused on Title VI specifically. OCR has prepared a draft guide to the design and development of equal employment opportunity plans that will be disseminated to all funding recipients. It also is preparing guidelines for grantees on compliance and compliance reviews. It made a presentation to program grantees on civil rights responsibilities and compliance at a regional conference and anticipates providing similar instruction in the future.

**Recommendation:** Regarding technical assistance, OCR should regularly train its staff and recipients' staff concerning the methods for achieving enforcement (step-by-step instruction on conducting procedures, such as compliance reviews) and new and developing civil rights issues, especially changing case law, statutes, regulations, and policies, affecting Title VI enforcement in OJP grant programs.

## Oversight of Continuing State Programs

**Finding:** Although OJP provides funds through continuing State programs, OCR does not ensure that States fulfill their Title VI compliance obligations (either by the submission of statements of compliance or methods of administration). OJP does require many State and local government recipients to develop equal employment opportunity plans;[112] however, because the EEOPs are limited to equal employment opportunity issues, they are not sufficient to evaluate recipients' compliance with Title VI.

**Recommendation:** OCR must establish a systematic oversight and monitoring program to evaluate the Title VI compliance policies and activities connected with all programs and activities administered at the State and local levels. First, States must submit methods of administration demonstrating how they intend to ensure recipient compliance with Title VI. That document must include, but should not be limited to, the following: 1) a specific public outreach and education plan for notifying subrecipients of Title VI compliance requirements; 2) a training program for State and local program staff, subrecipients, and beneficiaries regarding OJP's nondiscrimination policies and procedures; 3) procedures for processing complaints, notifying the funding agency, and informing beneficiaries of their rights; 4) a program assessing and reporting periodically on the status of Title VI compliance that involves more than merely a checklist of activities and assurances; and 5) detailed plans for bringing discriminatory programs into compliance. Such assurances are particularly important when the State is responsible for conducting compliance mechanisms, such as preaward reviews, investigating complaints, reviewing and evaluating subrecipients' self-assessments, and conducting compliance reviews. Second, OCR should regularly conduct reviews of the Title VI compliance policies and activities of States to evaluate how States are applying their methods of administration. Such reviews should entail a comprehensive evaluation of the States' Title VI enforcement performance. Third, OCR also should systematically monitor and oversee States' data collection and analysis program. Just as Federal funding agencies are required by DOJ to collect and maintain data on their direct recipients, State and local primary recipients must collect and maintain data on their potential and actual subrecipients, beneficiaries, and affected communities. It is the Federal agency's role to monitor this data collection process and ensure that States are maintaining sufficient records. Finally, OCR should also regularly provide technical assistance and other guidance to States to facilitate their Title VI enforcement efforts. Such assistance could involve instruction concerning methods for achieving enforcement (step-by-step instruction on procedures, such as compliance reviews), and new and developing civil rights issues affecting Title VI enforcement, such as changes in statutes, case decisions, regulations, and OJP compliance policies.

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[110] *See* p. 487.

[111] *See* p. 487.

[112] *See* p. 488.

## Staff Training

**Finding:** Although OJP has been active in providing civil rights enforcement training, training generally has been unrelated to its Title VI responsibilities. OJP provided OCR's Director and equal opportunity specialists with civil rights training. Furthermore, OJP has plans to develop procedures and criteria for preaward and postaward compliance reviews and, subsequently, plans to provide training. OJP did offer agencywide training to grant managers, educating them on Title VI requirements.[113]

**Recommendation:** OCR needs to conduct regular training of its staff and recipients' staff on issues of Title VI enforcement and compliance, including, but not limited to, the following areas: instruction on conducting enforcement procedures, such as compliance reviews, complaint investigations, and public education; the nexus between Title VI enforcement and a particular funding program's objectives and administration; the nexus between Title VI and other civil rights enforcement provisions relevant to ensuring nondiscrimination in federally funded activities; Title VI nondiscrimination requirements in particular types of OJP programs; and updates on revisions in OJP's policy, case law, statutes, regulations affecting Title VI enforcement and compliance.

## Data Collection and Analysis

**Finding:** OJP does not systematically collect and analyze data on applicants or recipients other than as part of the EEOP and through the preaward conditions for one of its programs.[114] These sources provide information on recipients' or grantees' employment practices, delivery of services, and consent decrees or judicial findings of discrimination. Furthermore, OCR has developed draft criteria by which to analyze some of these data. However, OJP fails to comply with DOJ's coordination regulations' requirement that the agency, in regard to *each* assisted program, provide for the collection of data and information from applicants and recipients sufficient to permit effective enforcement of Title VI.[115]

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[113] *See* p. 488.

[114] *See* pp. 488–89.

**Recommendation:** OCR must institute a systematic data and information collection and analysis program that covers each federally assisted program under OJP's jurisdiction. This program should ensure that funding recipients and officials responsible for State administered programs are fulfilling their Title VI compliance responsibilities. Information should be collected that assists OCR in ascertaining deficiencies in funding recipients' administration of OJP's programs. Such information should include, but should not be limited to: 1) the racial and ethnic makeup of potential and actual participants and beneficiaries, such as criminal justice practitioners eligible for and/or receiving technical assistance, and crime victims eligible for and/or receiving assistance and compensation; 2) the racial and ethnic makeup of the affected community in which a facility or center is built or targeted for building or where crime prevention programs concentrate; 3) the racial and ethnic makeup of the staff administering the program, such as the State and local criminal justice agencies, private nonprofit agencies, and juvenile receiving homes or detention centers; and 4) the previous histories of a recipient's or grantee's compliance with Title VI, including past findings of noncompliance, discrimination complaints resulting in cause findings, and litigation instituted against the recipient or grantee by the Department of Justice or other civil rights enforcement agency.

Such information should be collected regularly, independently of other enforcement measures, and not only in conjunction with compliance reviews. As part of its data collection and analysis system, OCR should establish a program information database, using the Department of Labor's "SPIR" system as a model. That database should represent an "umbrella" database, under which recipients should then be encouraged to maintain uniform databases. In order to effectuate this overall data collection and maintenance system, OCR should conduct staff training on all aspects of its function.

## Civil Rights Implementation Plans and Planning

**Finding:** OJP's implementation plans generally have been vague and inadequate, and they do not fulfill the purposes envisioned by the Department of Justice. For example, in 1991, OJP established as a long-range goal "ensur[ing] that recipients of OJP agency funds comply with all civil rights laws and regulations in a consistent fashion," but to do so chose the limited strategy of only conducting preaward reviews and investigating complaints, neglecting other critical compliance evaluation mechanisms. The other three objectives reported by OJP were never accomplished. It was not until the 1994 plan that OJP proposed to initiate post-award compliance reviews and indicated that it had requested additional staff to do so. The 1994 plan also lists the provision of civil rights training to OJP program managers as one of OJP's long-range goals.[116] However, the 1994 plan does not indicate plans to establish or improve other procedures, such as data collection and analysis and outreach and education. As such, OJP's implementation plans fail to demonstrate that OCR has developed a long-term and systematic external civil rights management plan or enforcement performance evaluation, as intended by the Department of Justice. However, OCR is operating currently under a strategic plan, and it has fulfilled some of the short-term goals under that plan, including the training of grant managers, the development of a desk manual for grant managers, and the provision of technical assistance to program grantees.

**Recommendation:** OJP must develop a comprehensive civil rights enforcement plan that incorporates the qualities of its implementation plan, strategic plan, and work plan. The ideal civil rights enforcement plan should embody: specific short-term goals and long-term objectives, specific time frames or deadlines for their accomplishment, specific short-term and long-term strategies for their accomplishment, consideration of both available and projected resources and budget constraints, application of these priorities and plans to each type of funding program administered, application of these priorities and plans to the particular enforcement mechanism for block grant and continuing State programs, and consideration of the number of expected complaints or other increase in workload. This enforcement plan should be updated every 3 months and should be adjustable to increases and decreases in actual compliance activities and responsibilities and new or developing civil rights enforcement issues, such as agency initiatives and concerns of recipients, participants, beneficiaries, and affected communities.

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[115] 28 C.F.R. § 42.406(a) (1994).

[116] *See* pp. 489–90.

## Chapter 14

# U.S. Department of Transportation

The U.S. Department of Transportation (DOT) oversees the programs and activities of all 50 State departments of transportation, more than 1,200 public airports and related facilities, approximately 400 mass transit providers, and other recipients of Federal transportation funds.[1] The Department is comprised of the Office of the Secretary and DOT's eight modal administrations: the Federal Aviation Administration, the Federal Highway Administration, the Federal Railroad Administration, the Federal Transit Administration, the Maritime Administration, the National Highway Traffic Safety Administration, the Research and Special Programs Administration, and the U.S. Coast Guard.[2]

## Structure of Civil Rights Enforcement at DOT

DOT's civil rights enforcement efforts are highly decentralized. They are coordinated by the Office of the Secretary and operated almost entirely by the modal administrations.

The Office of Civil Rights (OCR) in the Office of the Secretary is responsible for providing policy guidance on civil rights matters to the modal administrations, performing activities to ensure DOT's federally assisted and conducted programs are operated in compliance with civil rights statutes, evaluating performance of the modal administrations in the area of civil rights, and conducting all stages of the formal internal discrimination complaint process.[3] As discussed below, OCR in January 1995 took over responsibility for the internal complaint process from the DOT operating administrations.[4]

Thus, OCR's chief responsibility is the oversight and coordination of the modal administrations' civil rights activities. However, OCR also has operational responsibilities with respect to the investigations of internal complaints of discrimination.

Within the modal administrations, civil rights enforcement responsibilities also are decentralized. The modal administrations' headquarters civil rights offices are responsible for providing policy guidance and training to regional and collateral-duty staff, investigating formal complaints, conducting special emphasis programs, promoting equal employment opportunity within the administration, and advising their Administrators on civil rights matters.[5] They no longer are responsible for processing formal complaints of discrimination.[6]

The modal administrations' regional civil rights staff are responsible for reviewing and approving recipients' civil rights compliance plans, providing technical assistance to recipients, conducting periodic compliance reviews of recipients' operations, overseeing the processing of internal equal employment opportunity complaints, promoting equal employment opportunity within the regional offices, and advising regional administrators on civil rights matters.[7]

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[1] U.S. Department of Transportation, *Review of Civil Rights Consolidation Options*, April 1994, p. 3 (hereafter cited as *Consolidation Options*).

[2] 49 C.F.R. § 1.4 (1994).

[3] Organization and Delegation of Powers and Duties Delegations to the Director of the Departmental Office of Civil Rights, 60 Fed. Reg. 8, Jan. 12, 1995 (to be codified at 49 C.F.R. Part 1).

[4] *See* discussion below, pp. 502–04.

[5] Ibid.

[6] *See* 60 Fed. Reg. 8 (1995).

Lines of authority within DOT are not conducive to effective Title VI enforcement. The Director of OCR reports to the Secretary; the civil rights directors of headquarters' modal administrations report to the respective heads of the operating administrations, and with a few exceptions, the regional civil rights staff reports to their regional administrators.[8] Thus, the Director of OCR has no direct authority over most of the civil rights staff carrying out DOT's Title VI enforcement functions.

Legal services are decentralized as well.[9] The Director of OCR obtains advice from the General Counsel; the civil rights offices of headquarters modal administrations obtain advice from their chief counsels; and regional staff consult with regional counsels, all of whom report to the regional administrators.[10] A 1994 DOT report found that the criteria for seeking legal advice are "ill defined" and the circumstances varied widely.[11] In addition, "[DOT] legal staff do not consult with one another on civil rights matters in any consistent manner."[12] Thus, DOT's Title VI enforcement suffers from the lack of legal support within OCR.

In fiscal year 1993, DOT had a total civil rights staff, in headquarters and the modal administrations, of 209 full-time equivalent positions (FTEs), half in the field. In addition to the civil rights staff, the modal administrations assign several hundred employees to collateral civil rights duties, primarily as counselors and investigators in internal equal employment opportunity programs.[13]

DOT's civil rights staff have responsibility for a variety of civil rights statutes. Unlike some Federal departments, DOT's civil rights offices are charged not only with external civil rights enforcement, including enforcement of Title VI, but also with internal equal employment opportunity responsibilities. Furthermore, unlike any other agency discussed in this report, DOT's civil rights offices are responsible for managing the Department's disadvantaged business enterprise (DBE) program.

## Proposed Reorganization

In December 1993, Secretary of Transportation Federico Peña announced the formation of a task force to "develop the information necessary to understand how civil rights functions can be performed more effectively in the Department of Transportation."[14] The task force was directed to prepare a report assessing DOT's civil rights enforcement with a view toward consolidating operations.[15] The task force report, completed in April 1994, outlined DOT's civil rights enforcement apparatus, made findings, and offered recommendations for improving its operations.[16]

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[7] Ibid., p. 5.

[8] Ibid., p. 3. The Federal Transit Administration's regional office staff report directly to the director of the administration's civil rights office. *See* pp. 567–69. The Federal Railroad Administration and the National Highway Traffic Safety Administration do not have regional civil rights staff. *See* pp. 556 and 582, respectively.

[9] *Consolidation Options*, p. 3.

[10] Ibid.

[11] Ibid., p. 6.

[12] Ibid.

[13] Ibid.

[14] *Consolidation Options*, p. 1. *See also* Ann Bormolini, Chief of Staff, Office of the Secretary, U.S. Department of Transportation, memorandum to Departmental Officers and Heads of Operating Administrations, "Action: Implementation of Civil Rights Consolidation," July 26, 1994. According to this memorandum, DOT was supposed to complete the consolidation of the civil rights program by July 15, 1994. Ibid. However, as a result of the congressional conference report on DOT's 1995 appropriations, DOT did not proceed with the consolidation as planned. Burton Taylor, Deputy Director of Civil Rights, U.S. Department of Transportation, interview in Washington, D.C., Oct. 20, 1994 (hereafter cited as Taylor interview). For a further discussion, *see* p. 504.

Of the report's eight findings, five warrant particular attention:

> There is a strong and widely held belief that DOT is not doing its job in civil rights and that civil rights responsibilities in DOT have been long neglected. . . .[17]
>
> Civil rights staff are not well deployed and the structure is top heavy with multiple layers of management. The current structure creates an overlap between [OCR's] responsibilities and those of the [modal administrations'] civil rights offices. Regional civil rights staff are insufficient in number and often do not have a sufficient degree of independence or the expertise to enforce civil rights laws adequately.[18]
>
> The current responsibilities of [OCR] are untenable. It is not feasible or desirable for a small headquarters staff to have both policy and operational responsibilities. This small office cannot "steer" and "row" at the same time and, at present, it is doing neither effectively. . . .[19]
>
> Additional responsibilities and workload flowing from the Americans with Disabilities Act and the Executive Order on Federal Actions to Address Environmental Justice for Minority Populations and Low-Income Populations increase the urgency for DOT to use its civil rights resources as efficiently and effectively as possible.[20]
>
> Changes in structure and deployment of staff are necessary to create a viable civil rights program in DOT, but they are not sufficient. Training, closer working relationships with legal staff, increased support by DOT management, and the adoption of new approaches to accomplishing objectives are needed.[21]

The task force report's major recommendation was the consolidation of civil rights oversight, policymaking, and enforcement in OCR.[22] According to the report:

> With certain exceptions, this office would be responsible for all civil rights functions presently assigned to the [modal administrations] including those performed outside civil rights offices. Exceptions would include legal functions performed by the General Counsel, Chief Counsels, or Regional Counsels; internal affirmative action and diversity programs; responsibility for internal equal employment opportunity (EEO) complaints prior to the formal stage; coordination of special emphasis observances; functions assigned to the Office of Small and Disadvantaged Business Utilization (S–40); and activities conducted by the U.S. Coast Guard to ensure equal opportunity for its personnel. In addition, OA [operating administration] program offices would continue to be responsible for ensuring that proposed projects to be funded by the Department meet civil rights requirements and would administer grant programs which fund civil rights training for recipients. The office would have staff in the regions which would have increased operational responsibilities, including processing both internal and external complaints. The responsibility to determine whether denials of certification or improper certification of small businesses as DBEs [disadvantaged business enterprises] would be transferred to S–40 [the Office of Small and Disadvantaged Business Utilization].[23]

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[15] Federico Peña, Secretary of Transportation, Memorandum to Heads of Operating Administrations, Dec. 12, 1993.

[16] *Consolidation Options.*

[17] Ibid., Finding B, p. i.

[18] Ibid., Finding C, pp. i–ii.

[19] Ibid., Finding D, p. ii.

[20] Ibid., Finding F, p. ii.

[21] Ibid., Finding G, p. ii.

[22] Ibid., pp. ii–iii.

[23] Ibid., pp. ii–iii.

In July 1994, Secretary Peña outlined much of the structure of the proposed reorganization:

> Under this plan the operating administrations will retain responsibility for developing and implementing affirmative action and diversity plans, conducting special emphasis programs, and attempting to resolve equal employment opportunity (EEO) disputes within DOT through informal means. They also will be responsible for obtaining formal assurances that recipients of Department funds comply with all applicable civil rights laws and will work with the DOCR [the Department's Office of Civil Rights] to help ensure that compliance with these laws is obtained through voluntary means whenever possible;
>
> The DOCR will investigate and decide all formal EEO complaints. In addition, it will conduct compliance activities, including approving compliance plans and performing complaint investigations and compliance reviews, to ensure that recipients of DOT funds meet all applicable civil rights requirements; and
>
> Legal support services for those civil rights compliance functions which transfer to the DOCR will be provided by the Office of the General Counsel. However, legal representation for the operating administrations in connection with EEO complaints will continue to be provided by Offices of the Chief Counsel.[24]

DOT's consolidation plan was included in the Senate appropriation bill for fiscal year 1995.[25] However, the conference report on DOT appropriations gave only limited approval to the Department's plan:

> The conferees are aware of significant concerns regarding the potential consolidation of external civil rights activities, including those related to disadvantaged business enterprises. Because of these concerns, the conferees have eliminated these activities from the consolidation. In contrast, there is general consensus that consolidation of internal activities will result in more effective handling of civil rights complaints within DOT.
>
> The conferees wish to make it clear that only internal civil rights activities are to be consolidated, and direct the department to take no actions to reorganize, redirect funding, or otherwise affect changes to the current civil rights programs of the department which are inconsistent with this Congressional intent.[26]

As a result, DOT did not proceed with the complete consolidation outlined in its report. However, DOT did begin a more limited consolidation, affecting its internal civil rights programs only. As of January 1995, DOT gave OCR the responsibility for conducting DOT's processing of internal formal complaints of discrimination.[27] It began to expand its headquarters staff in order to strengthen operations and to transfer internal equal employment opportunity functions to headquarters control.[28]

DOT's January 1995 consolidation, which is limited to DOT's internal civil rights functions, did not in any way address problems with DOT's organizational structure as it pertains to Title VI enforcement. In particular, it did not give DOT's umbrella civil rights office, OCR, adequate authority to oversee civil rights staff performing Title VI activities. Except for those few staff already in OCR, these civil rights staff remain in their current positions in the modal administrations and will not report to OCR. Thus, DOT's original consolidation plan, which would have transferred both internal and external civil rights activities from the modal administrations to OCR, with all civil rights staff, including those in the modal administrations' regions, reporting to the Director of OCR, would have dealt better with DOT's inadequacies with respect to external civil rights enforcement. DOT has not abandoned its original consolidation plan: DOT has included a request to consolidate the Department's external civil rights program in its budget proposal for fiscal year 1996.[29]

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[24] Federico Peña, Secretary of Transportation, memorandum to all U.S. Department of Transportation employees, July 15, 1994, p. 2.

[25] Taylor interview, p. 1.

[26] U.S. Congress, House, H.R. Conf. Rep. No. 4556, 103d Cong., 2d Sess. (1994).

[27] *See* 60 Fed. Reg. 8 (1995); U.S. Department of Transportation, "Department of Transportation Organization Manual—Change," DOT 1160.60A, CHG–3, Jan. 4, 1995 (hereafter cited as January 1995 Change to DOT Organization Manual).

[28] Taylor interview, p. 2.

Because the January 1995 reorganization is recent, except where indicated, the discussion in this chapter relates to Title VI enforcement under DOT's organizational structure as of July 1994.

## DOT's Title VI Regulations

The U.S. Department of Justice approved DOT's departmentwide Title VI regulations in June 1970.[30] The regulations apply to any program for which Federal financial assistance is authorized under a law administered by DOT.[31] In addition, some administrations have developed their own supplementary regulations.[32]

In most respects, DOT's Title VI regulations resemble the U.S. Department of Education's Title VI regulations,[33] which the Department of Justice promulgated as model regulations.[34] They discuss the types of discrimination prohibited,[35] assurances required of applicants,[36] types of compliance information,[37] investigations,[38] the procedure for effecting compliance,[39] hearings,[40] decisions and notices,[41] provisions for judicial review,[42] the effect of DOT's Title VI regulations,[43] forms and instructions for effectuating the regulations,[44] and definitions of relevant terms.[45] The regulations include language similar to that in the Department of Education's regulations[46] allowing a finding of discrimination based on disparate impact.[47] They prohibit employment discrimination in DOT-funded programs both where the primary purpose of the program is the provision of employment and where employment discrimination tends to cause discrimination against beneficiaries of the program.[48]

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[29] Antonio J. Califa, Director, Departmental Office of Civil Rights, U.S. Department of Transportation, letter to Mary Frances Berry, Chairperson, U.S. Commission on Civil Rights (no date), p. 1.

[30] 49 C.F.R. Part 21 (1994).

[31] *Id.* § 21.3(a).

[32] For example, the Federal Highway Administration has Title VI regulations, 23 C.F.R. Part 200 (1993). The regulations state: "it is the policy of the FHWA to ensure compliance with Title VI of the Civil Rights Act of 1964; 49 C.F.R. Part 21; and related statutes and regulations." *Id.* § 200.7. The primary difference between 23 C.F.R. Part 200 and 49 C.F.R. Part 21 is that the Federal Highway Administration's regulations specifically outline the responsibility of State highway agencies, whereas 49 C.F.R. Part 21 does not directly address State agencies. Federal Railroad Administration regulations also identify which agency programs and activities are covered by Title VI. 49 C.F.R. Part 265 Appendix A (1993).

[33] 34 C.F.R. Part 100 (1993).

[34] At the time the Department of Justice promulgated DOE's regulations as a model, DOE's regulations were actually the regulations of the former U.S. Department of Health, Education, and Welfare (HEW). When HEW was divided into the U.S. Department of Education and the U.S. Department of Health and Human Services, DOE adopted HEW's regulations.

[35] 49 C.F.R. § 21.5 (1994).

[36] *Id.* § 21.7.

[37] *Id.* § 21.9.

[38] *Id.* § 21.11.

[39] *Id.* § 21.13.

[40] *Id.* § 21.15.

[41] *Id.* § 21.17.

[42] *Id.* § 21.19.

[43] *Id.* § 21.21(b).

[44] *Id.* § 21.23.

[45] 49 C.F.R. Part 21 (1994).

Unlike many of the other Federal agencies that adopted the Department of Education's regulations, DOT adapted and revised the Department of Education's model regulations to fit DOT's programs. For example, DOT did not retain the education-related examples in its regulations as many agencies did. Instead, DOT's regulations provide specific examples related to DOT-funded transportation programs in an appendix to the regulations.[49] The regulations also contain one appendix listing the programs to which the regulations apply[50] and another listing DOT-funded programs that have the provision of employment as a primary objective.[51]

However, contrary to the Department of Justice's coordination regulations,[52] the appendix listing DOT programs covered by Title VI has not been updated since at least 1970.[53] Furthermore, not every DOT modal administration has an appendix listing the Federal financial assistance programs it administers.[54]

Finally, since DOT has not revised its regulations since 1975,[55] they do not reflect recent Title VI developments, such as the enactment of the Civil Rights Restoration Act of 1987.[56]

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[46] 34 C.F.R. § 100.3(b)(2),(3) (1993).

[47] 49 C.F.R. § 21.5(b)(2),(3) (1994).

[48] *Id.* § 21.5(c).

[49] *Id.*, Appendix C.

[50] *Id.* Appendix A.

[51] *Id.* Appendix B.

[52] 28 C.F.R. § 42.403(d) (1993). The Department of Justice revised its coordination regulations to reflect Executive Order 12,250. See discussion in chap. 3, p. 74.

[53] 29 C.F.R. Part 21 (1994).

[54] *Id.*

[55] *See id.* The official codification of DOT's Title VI regulations in the Code of Federal Regulations indicates that these regulations were last revised in 1975. *Id.*

[56] Pub. L. No. 100–259, 102 Stat. 28 (codified as amended at scattered sections of U.S.C.).

In 1981, DOT proposed new Title VI regulations,[57] but never issued them. In 1989 the Office of the Secretary withdrew the 1981 Notice of Proposed Rulemaking (NPRM).[58] DOT reported that:

> The Department received sixteen comments in response to the NPRM. Most of these comments were from state or local agencies receiving DOT assistance. All of the comments were negative and primarily criticized the NPRM for being ambiguous and for placing unnecessary administrative and financial burdens on state and local units of government. The Department concluded that existing rules are adequate for implementing Title VI and that the proposed revisions could have unnecessarily increased administrative burdens on DOT financial assistance recipients. The NPRM was withdrawn on October 24, 1989.[59]

Thus, DOT's Title VI regulations form a minimally adequate basis for DOT's Title VI enforcement program. However, like those of most other agencies, they are outdated.

## Office of Civil Rights in the Office of the Secretary

### Organization and Responsibilities

OCR is headed by a Director who reports directly to the Secretary of Transportation and serves as the Secretary's principal advisor on civil rights and equal opportunity matters.[60] The Director has a leadership and coordination role with respect to the civil rights programs of the DOT modal administrations.[61] Under the DOT structure in existence through July 1994, OCR consisted of three divisions, each of which was headed by a chief: the Internal Programs Division; the Policy, Evaluation, and Planning Division; and the External Programs Division.[62]

Under the January 1995 reorganization, DOT has created four divisions in OCR: the Data and Evaluation Division; the Internal Policy, Program Development, and Support Division; the External Policy and Program Development Division; and the Compliance Operations Division.[63] The External Policy and Program Development Division is responsible for OCR's activities with respect to external civil rights matters, including Title VI. It:

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[57] *See* U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Transportation, Research and Special Programs Administration, Q. 9, p. 8 (hereafter cited as DOT/RSPA Survey); U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Transportation, National Highway Traffic Safety Administration, Q. 9, p. 8 (hereafter cited as (DOT/NHTSA Survey); U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Transportation, Federal Railroad Administration, Q. 9, p. 8 (hereafter cited as DOT/FRA Survey); U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Transportation, U.S. Coast Guard, Q. 9, p. 8 (hereafter cited as DOT/USCG Survey); and U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Transportation, Federal Aviation Administration, Q. 9, p. 8 (hereafter cited as DOT/FAA Survey).

[58] 46 Fed. Reg. 5587 (1989).

[59] DOT/RSPA Survey, Q. 9, p. 8. *See also* DOT/NHTSA Survey, Q. 9, p. 8; DOT/FRA Survey, Q. 9, p. 8; DOT/USCG Survey, Q. 9, p. 8; and DOT/FAA Survey, Q. 9, p. 8.

[60] U.S. Department of Transportation, Departmental Office of Civil Rights, organizational chart, submitted as an attachment to U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Transportation, Office of the Secretary (hereafter cited as DOT/OS Survey); U.S. Department of Transportation, Office of the Secretary, "Fiscal Year 1994 Civil Rights Implementation Plan Requirements," p. 2 (hereafter cited as DOT/OS FY 1994 Implementation Plan).

[61] DOT/OS FY 1994 Implementation Plan, p. 2.

[62] Ibid.

- develops civil rights regulations, policies, guidelines, and procedures;
- trains operating administration staff on policies and procedures relating to external civil rights;
- provides technical assistance to operating administration staff; and
- coordinates with other Government agencies.[64]

As of October 1994, the Deputy Director of OCR expected that each division would have 8–9 staff members.[65] In addition, the Compliance Operations Division would maintain staff in six regional offices: New York; Washington, D.C.; Atlanta; Chicago; Fort Worth; and San Francisco.[66] The regional OCR offices would have 52 FTEs.[67] Thus, OCR as a whole would have a total of 86 FTEs, a considerable increase over its current staffing level of 21 FTEs. None of the regional civil rights staff located in the larger modal administrations will be affected.[68]

OCR has responsibility for enforcing Title VI as well as other civil rights laws.[69] The major function of OCR is to oversee civil rights programs and develop standards and procedures to ensure:

1) Equal opportunity in internal employment practices throughout DOT;
2) Equal opportunity in the employment practices of DOT contractors, and subcontractors, including material suppliers;
3) Equal opportunity by recipients of DOT-sponsored Federal assistance; and
4) Administration of all DOT programs and activities affecting housing and urban development in an affirmative manner.[70]

DOT Order 1000.12 details the responsibilities of OCR. These include:

- developing and disseminating policy;[71]

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[63] January 1995 Change to DOT Organization Manual, pp. II–17—II–20.1.

[64] Ibid.

[65] U.S. Department of Transportation, "Proposed Organization of Consolidated Departmental Office of Civil Rights (as of 10/5/94)" (organization chart).

[66] At present, these staff would constitute the sole representation in the field of the Office of the Secretary.

[67] Ibid.

[68] Taylor interview, p. 2.

[69] In addition to Title VI, OCR's responsibilities include the enforcement of the Equal Employment Opportunity Act of 1972, as amended, 42 U.S.C. §§ 2000e-17 (1988 and Supp. V 1993); section 504 the Rehabilitation Act of 1973, 29 U.S.C. §§ 701–796i (1988); the Fair Labor Standards Amendments Act of 1974, 29 U.S.C. §§ 201–209 (1988); the Age Discrimination Act of 1975, 42 U.S.C. §§ 6101–6107 (1993); Title IX of the Education Amendments Act of 1972, 20 U.S.C. §§ 1681–1688 (1988); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12,101–12,213 (Supp. V 1993); and Executive Orders 11,478, 11,625, and 12,320. Executive Order 11,478, issued on August 12, 1969, discusses Equal Employment Opportunity in the Federal Government. Executive Order 11,625, issued on October 14, 1971, requires Federal executive agencies to develop comprehensive plans and programs to encourage minority business enterprises. Executive Order 12,320, issued September 15, 1981, discusses historically black colleges and universities.

[70] U.S. Department of Transportation, Office of the Secretary, mission and function statement for the Office of Civil Rights, submitted as an attachment to DOT/OS Survey. Other functions include, but are not limited to oversight of DOT's Historically Black Colleges Program, Federal Women's Program, Hispanic Program, and Native American Program. Ibid.

[71] According to OCR's fiscal year 1994 Civil Rights Implementation Plan, the Office of Transportation Regulatory Affairs and the Deputy Assistant General Counsel for Regulation and Enforcement handle civil rights policy development and dissemination functions. DOT/OS FY 1994 Implementation Plan, p. 5.

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- preparing uniform regulations, guidelines, and program directives;
- reviewing and evaluating the modal administrations' activities and compliance with DOT orders;
- providing leadership, guidance, and technical assistance to the modal administrations;
- overseeing DOT's complaint processing;
- taking action with regard to findings of noncompliance;
- coordinating with other Federal agencies;
- conducting public outreach and education.[72]

Although OCR has been given these responsibilities by DOT order, the Commission found, both in a 1993 report[73] and in the present study, that OCR has not been active in most of the areas in which it has responsibilities. DOT's own Inspector General has reached a similar finding in a draft report evaluating the Department's civil rights offices. In particular, the Inspector General concluded:

> DOT [civil rights] programs are not operated, or monitored in an effective, or efficient manner. Prior DOCR management failed to carry out the duties and responsibilities described in its mission and function statement, DOT Order 1100,.60A. Specifically, past DOCR management exercised limited and inadequate authority to write Departmental policies and procedures; ensure consistent, equitable, and appropriate implementation of [civil rights programs]; require formal reports; and otherwise perform an oversight role.[74]

## Budget and Staffing

The budget of the Office of the Secretary includes an earmark for OCR.[75] However, Title VI enforcement is not a line item.[76] Moreover, the Commission was unable to obtain information regarding separate expenditures by OCR for implementation and enforcement of civil rights statutes pertaining to federally assisted and federally conducted programs[77] or, specifically, for Title VI implementation and enforcement.[78] Thus, DOT's Office of the Secretary cannot track expenditures on Title VI adequately to support sound management decisionmaking on the allocation of resources within OCR.

DOT allotted 21 FTE positions to OCR in fiscal year 1993.[79] Of these, OCR assigned only 1.5 FTEs to Title VI enforcement, a decrease of 0.5 FTE from the previous year.[80] In 1994, OCR allocated four full-time positions to the enforcement of Title VI, section 504 of the Rehabilitation Act, the Americans with Disabilities Act and Title IX.[81] However, OCR assigned only one full-time employee to the enforcement of those civil rights laws as well as appeals of certification denials.[82] This same full-time employee also processes complaints of discrimination in federally conducted programs filed under section 504 of the Rehabilitation Act.[83] Therefore, the number of staff actually assigned to external civil rights enforcement is inconsistent with the number of staff and amount of resources allocated to these functions.

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[72] U.S. Department of Transportation, Order 1000.12, "Implementation of the Department of Transportation Title VI Program," Jan. 19, 1977, pp. I–3—I–4 (hereafter cited as DOT Order 1000.12).

[73] U.S. Commission on Civil Rights, *Enforcement of Equal Employment and Economic Opportunity Laws and Programs Relating to Federally Assisted Transportation Projects*, January 1993 (hereafter cited as USCCR, *Enforcement of Equal Employment and Economic Opportunity Laws and Programs*).

[74] Office of Inspections and Evaluations, Office of Inspector General, U.S. Department of Transportation, *The Department of Transportation Offices of Civil Rights*, Draft Report, Mar. 14 1995, p. ii (hereafter cited as DOT Inspector General's *Draft Report*).

[75] Cong. Rec. H9723. (daily ed. Sept. 26, 1994). DOT's fiscal 1994 conference budget earmarks $58.09 million to cover the salaries and expenses of the Office of Secretary, of which $1.78 million DOT allocates to the Office of Civil Rights.

[76] DOT/OS Survey, Q. 29, p. 20.

[77] Ibid., Q. 33, p. 23.

[78] Ibid., Q. 29, p. 20.

[79] *Consolidation Options*, Appendix 6.

[80] DOT/OS Survey, Q. 36, p. 26.

## Oversight of the Modal Administrations

Although oversight of the modal administrations is one of OCR's chief responsibilities, OCR has not provided any general oversight, monitoring, or coordination of its Title VI programs with the modal administrations or the administrations' regional and field office staff for at least the last 5 years.[84] Thus, DOT does not evaluate the modal administrations to ensure that they are enforcing Title VI and other civil rights statutes adequately.

According to the Director of the Federal Railroad Administration's Office of Civil Rights, the Office of the Secretary's OCR and the Federal Railroad Administration's civil rights office have a professional working relationship, and communicate on an as-needed basis with respect to internal and external civil rights activities. However, most of the contact between the two civil rights offices is not related to Title VI.[85]

The draft report on DOT's civil rights offices by DOT's Inspector General determined that OCR's failure to oversee and coordinate the modal administrations' civil rights efforts has "resulted in [OCR] and [operating administration civil rights] offices which have not fully implemented, or enforced, all required [civil rights] programs. Specifically, OCR concentrates their efforts on only two major program areas (Title VII and DBE) [and] places minimal emphasis on Title VI. . . ."[86]

## Directives, Policies, Procedures, and Guidelines

A second major responsibility of OCR is to develop directives, policies, procedures, and guidelines for dissemination to DOT's modal administrations to ensure that civil rights enforcement is conducted consistently throughout DOT. OCR has met this requirement chiefly through the issuance of civil rights directives. The civil rights directives are comprehensive and lay a sound foundation for the modal administrations' Title VI enforcement programs.

DOT has issued two broad directives on civil rights enforcement—DOT Orders 1000.2B and 1050.2.

Order 1000.2B establishes departmental policy.[87] According to the order:

> Every employee and representative shall perform all official actions affirmatively and in full accord with the spirit and letter of the Constitution and applicable laws, orders, policies, and regulations to assure equality of opportunity for all persons and avoid even the appearance of discrimination because of race, color, religion, sex, age, national origin, or handicap. Complaints of discrimination involving these issues shall be reviewed and processed promptly, fairly, and impartially.[88]

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[81] DOT/OS FY 1994 Implementation Plan, p. 3.

[82] Ibid.

[83] Ibid.

[84] *See* Taylor interview, p. 2.

[85] Miles S. Washington, Director, Office of Civil Rights, Federal Railroad Administration, U.S. Department of Transportation, letter to Frederick D. Isler, Acting Assistant Staff Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, July 25, 1994, p. 2.

[86] DOT Inspector General's *Draft Report*, p. 7.

[87] U.S. Department of Transportation, Office of the Secretary, DOT Order 1000.2B, May 22, 1989, p. 1.

[88] *Id.*, p. 2.

The order also outlines the civil rights responsibilities of OCR, the Assistant Secretary for Administration, and the head of each operating (modal) administration.[89] Another DOT order, Order 1050.2 details the responsibilities of OCR, the Assistant Secretary for Administration, and the modal administration with respect to collecting standard DOT Title VI assurances.[90]

In addition, DOT Order 1000.12, which DOT issued in 1977,[91] guides DOT's Title VI enforcement. It implements Title VI, DOT's Title VI regulations,[92] and the regulations of the Department of Justice.[93] Order 1000.12 establishes uniform minimum responsibilities for each operating component within DOT in implementing and enforcing the Title VI program. Although compliance standards may vary among administrations, all must include core criteria identified in the order.[94]

Chapter one of the order states the purpose of the modal administrations' Title VI programs, defines relevant terms, lists the responsibilities of the departmental director of civil rights and the modal administrations, and directs the modal administrations to refer to the Office of the Secretary's OCR all possible violations of Title VI and cooperate with that office on all investigations.[95] Chapter two addresses minority contractor participation, with particular attention devoted to application review procedures.[96] Chapter three discusses Title VI-covered employment. Included in this discussion is the definition of covered employment, different types of covered employment, modal administrations' compliance responsibilities, and preaward agreements.[97] Chapter four outlines compliance review procedures ranging from application review procedures to onsite compliance review to periodic compliance reports.[98] Chapter five addresses the filing, processing, investigation, and disposition of complaints of discrimination, as well as recordkeeping and reporting requirements.[99] Chapter six enumerates informal resolution procedures.[100] Chapter seven discusses enforcement actions and sanctions available to DOT when an applicant or recipient is in noncompliance.[101] The order establishes the uniform minimum responsibilities of each operating element in implementing and enforcing the Title VI program.[102]

Although DOT has not updated its Title VI regulations to reflect the Civil Rights Restoration Act, DOT Order 1000.12 indicates that the act broadened DOT's jurisdiction by expanding the definition of federally assisted programs to include all programs of a recipient.[103]

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[89] *Id.*

[90] U.S. Department of Transportation, Office of the Secretary, DOT Order 1050.2, Aug. 24, 1971, pp. 1–2.

[91] DOT Order 1000.12.

[92] 49 C.F.R. Part 21 (1993).

[93] 28 C.F.R. Part 42, Subpart F (1993).

[94] DOT Order 1000.12.

[95] *Id.*, chapter I, pp. I–1—I–7.

[96] *Id.*, chapter II, pp. II–1—II–2.

[97] *Id.*, chapter III, pp. III–1—III–3.

[98] *Id.*, chapter IV, pp. IV–1—IV–5.

[99] *Id.*, chapter V, pp. V–1—V–8.

[100] *Id.*, chapter VI, pp. VI–1—VI–2.

[101] *Id.*, chapter VII, pp. VII–1—VII–3.

[102] *Id.*

Except for the two comprehensive civil rights directives, however, OCR has failed to take adequate steps to develop DOT's civil rights policy. DOT has not issued any policy statements concerning Title VI in recent years. For instance, DOT has never issued a statement analyzing the implications of the Civil Rights Restoration Act for DOT's Title VI enforcement.

In March 1995, OCR issued interim complaint procedures, giving the operating administrations primary responsibility for processing external civil rights complaints. The procedures limit OCR primarily to an advisory role.[104]

## Process of Title VI Enforcement

DOT's Title VI responsibilities are divided between OCR and DOT's modal administrations, but the primary Title VI enforcement responsibility rests with the modal administrations.[105] Although OCR's role is primarily one of policy development and oversight, OCR also has responsibility for some aspects of the department's Title VI enforcement, as identified below.

### Complaint Processing

Until March 1995, OCR had ultimate responsibility for investigating complaints, but some complaints are referred to the modal administrations for investigation.[106] DOT Order 1000.12 guides complaint processing at DOT. It discusses the assignment of the complaint, preparations for the inquiry, available actions upon a respondent's failure to cooperate, minimum requirements for interviewing a respondent and others, preparation of the investigation report, development of the notice of finding, and requests for reconsideration.[107] As of March 1995, OCR has given the operating administrations' primary responsibility for processing all Title VI complaints.[108]

OCR received a total of 145 Title VI complaints for 1984, 1988, 1992, and 1993, or 9.2 percent of the 1,499 complaints based on all other civil rights statutes for the same years.[109] Over time, the number of Title VI complaints received by DOT decreased, both absolutely and as a percentage of all complaints.[110] In 1988, OCR made no-cause findings in 13 Title VI cases; in 1992, the number fell to 3, and it rose to 7 in 1993.[111] For the years 1992 to 1993, 28 of 39 Title VI cases were closed administratively.[112] In fiscal year 1993, OCR received 285 complaints. Thirty-six were related to Title VI.[113] However, no information was provided on how these complaints were resolved.

DOT's overall complaint workload has increased substantially as a result of the Americans with Disabilities Act. DOT receives more complaints filed under Title II of the Americans with Disabilities Act than under any other statute.[114]

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[103] *Id.*, p. I-1.

[104] U.S. Department of Transportation, Departmental Office of Civil Rights, "Interim Procedures for Processing External Civil Rights Complaints," Mar. 23, 1995 (hereafter cited as DOT Interim Complaint Procedures).

[105] *See* USCCR, *Enforcement of Equal Employment and Economic Opportunity Laws and Programs*, January 1993, p. 2; DOT/OS Survey, Q. 25, pp. 18–19. *See also* Taylor interview.

[106] DOT Order 1000.12, chapter V, pp. V-1—V-8; DOT/OS Survey, Q. 25(j), p. 19; DOT/OS FY 1994 Implementation Plan, p. 2.

[107] *Id.*, pp. V-7/8.

[108] DOT Interim Complaint Procedures.

[109] DOT/OS Survey, Q. 71, p. 45. *See* table 14.1 for the distribution of these complaints across years.

[110] *See* table 14.1.

[111] DOT/OS Survey, Q. 74, p. 47.

[112] Ibid., Q. 75, p. 48.

[113] DOT/OS FY 1994 Implementation Plan, FY 1993 Workload and Performance Data, p. 14.

### Outreach and Education

Outreach and education is OCR's responsibility.[115] Outreach and education activities were reported to include disseminating Title VI procedures, guidelines, and compliance information to recipients, grantees, subgrantees, beneficiaries, potential beneficiaries, eligible organizations, and affected communities. However, there is no evidence that DOT performed any of these activities during the last 5 years. The absence of a significant outreach and education effort by OCR is a serious deficiency. The application of Title VI to DOT's federally assisted programs, which often involve long-term transportation projects, is unlikely to be obvious to intended beneficiaries or members of the public adversely affected by these projects. Therefore, a comprehensive outreach and education program to inform the public about their rights under Title VI is necessary to ensure compliance with the law.

### Technical Assistance

OCR is responsible for providing technical assistance to the modal administrations.[116] Although OCR provides this assistance upon request,[117] there is no indication of how OCR provides it or that OCR has devoted many resources to this activity recently.

## Monitoring State Title VI Enforcement

The Department of Justice's coordination regulations direct Federal agencies to monitor States' compliance programs for continuing State programs.[118] A Title VI compliance manual, published by the Commission in 1966, specifies that, as a condition to approval and/or extension of Title VI assistance, State-administered continuing programs must:

> [p]rovide methods of administration for the program designed to assure that the applicant and all recipients under the program will comply with all requirements imposed by the regulators and include methods of administration which give reasonable assurance that any existing noncompliance will be corrected.[119]

Acceptable methods of administration should require recipients to inform beneficiaries of their rights, plan for the training and orientation of staff, develop procedures for processing complaints, establish a program for compliance review, and design specific steps for ensuring compliance.[120] DOT regulations require all continuing State programs receiving Federal assistance to identify methods of administration specifying how they intend to ensure compliance.[121]

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[114] DOT/OS Survey, Q. 28, p. 20.

[115] DOT Order 1000.12, I–4. *See also* DOT/OS Survey, Q. 25(h), p. 18.

[116] DOT Order 1000.12, p. I–4.

[117] Ibid., Q. 53, p. 36. The survey response noted that requests for technical assistance had been made by three States. However, the nature and timing of the requests were not reported.

[118] 28 C.F.R. § 42.410 (1993).

[119] U.S. Commission on Civil Rights, *Compliance Officer's Manual: A Handbook of Compliance Procedures under Title VI of the Civil Rights Act of 1964*, October 1966, § 6.311. See chapter 4 for a discussion on the development and use of the Commission's 1966 compliance manual.

[120] Ibid.

Although responsibility for general oversight, coordination, and monitoring of Title VI programs in State and local governments is divided between OCR and the modal administrations,[122] OCR has not played a significant role in monitoring the Title VI programs in the regions, field offices, or the State and local agencies in recent years.[123] The reduced role is attributable to staff cuts and policy changes.[124]

## Staff Training

OCR and the modal administrations share responsibility for training civil rights staff, program managers, and contract and project officers, as well as State and local agencies and recipients. New OCR staff receive training in compliance procedures. OCR provides training to modal administrations, State and local agencies, and recipients as requested.[125]

## Data Collection and Analysis

OCR places little emphasis on data collection and analysis in its Title VI enforcement efforts. For example, OCR currently does not supervise enforcement of data collection requirements by the modal administrations. Data collection is largely the responsibility of the State agencies receiving and distributing Federal funds, and is not always reliable or consistent.[126] Furthermore, OCR has difficulty utilizing its new complaint information system (EXTRAK).[127] It explained that it "can only put information in but [cannot retrieve] the same information in a report format,"[128] and that "most of the information requests are not maintained by the Departmental OCR which results in [OCR] having to request information from the modal administration's Offices of Civil Rights."[129] Finally, OCR indicated that it does not need to "resort" to using statistics to determine compliance.[130]

## Civil Rights Implementation Plans

The Commission reviewed OCR's 1994 Civil Rights Implementation Plan, the only plan submitted to the Department of Justice in several years. The plan covers fiscal years 1994 through 1997.[131] Although the Department of Justice found that "[the plan] generally provides good background material and supporting information, but does not describe adequately short-term objectives for the coming year or past progress,"[132] the plan is extremely cursory. It follows the Department of Justice's guidelines in outline form, but does not provide sufficient information in most areas for either the Department of Justice or the general public to understand OCR's civil rights compliance program.[133] Also, the plan's reporting of Title VI activities seems incomplete when compared to reporting of activities for Title II of the Americans with Disabilities Act.[134] Furthermore, the goals and objectives laid out in the plan are inadequate. Contrary to the Department of Justice's guidelines, which require goals in several areas of the civil rights implementation and enforcement process, such as compliance reviews and complaint processing, the plan has only one long-range goal and one major objective, both of which are extremely general.[135] The plan is confusing in that it contains both "short-term" objectives, which are all related to complaint processing, and "short-range goals." The short-range goals described in the plan are broad and general, and do not have a timetable for implementation or milestones. None of the goals and objectives reflects a determined effort to improve Title VI implementation and enforcement. Finally, the plan does not provide budget resource information or appear to be serving as a management tool for OCR, as required by the Department of Justice's guidelines.[136]

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[121] 49 C.F.R. § 21.7(b) (1994).

[122] DOT/OS Survey, Q. 25(l), p. 19. *See also* modal administrations' survey responses, Q. 25(l).

[123] DOT/OS Survey, Q. 25(m), p. 19.

[124] Taylor interview.

[125] DOT/OS Survey. Q. 25(i), pp. 18–19.

[126] Taylor interview.

[127] DOT/OS FY 1994 Implementation Plan, p. 6.

[128] Ibid.

[129] Ibid.

[130] Ibid., p. 7.

[131] DOT/OS FY 1994 Implementation Plan, p. 1.

[132] Catherine O'Brien, Civil Rights Analyst (Coordinator), Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, memorandum to Merrily A. Friedlander, Acting Chief, Coordination and Review Section, Civil Rights Division, "Department of Transportation's (DOT) FY 1994 Civil Rights Implementation Plan Review," Sept. 23, 1994.

## Progress Since Commission's Previous Report on DOT

In a study of DOT's civil rights enforcement at the Denver International Airport project, the Commission found that "Title VI enforcement at the Department of Transportation lacks leadership and direction."[137] The Commission concluded that:

> Civil rights enforcement is neither a top priority nor an integral part of the Department of Transportation's primary mission planning. The Secretary of Transportation has delegated authority to the eight modal administrations to enforce certain civil rights laws and programs, but has failed to monitor and assess aspects of enforcement such as budget, staff resources, compliance reviews, and complaint investigation. As a direct consequence, civil rights enforcement at the departmental level and within at least one modal administration, the Federal Aviation Administration, is grossly underfunded.[138]

The Commission also found that OCR was not in compliance with DOT internal Order 1000.12, which details guidelines for conducting the civil rights programs of the modal administrations.[139]

To address these findings, the Commission urged the Secretary of Transportation to:

1) Develop a management plan to ensure that Title VI onsite compliance reviews are one of the major priorities of the various modal administrations;
2) Hire additional compliance officers to oversee the civil rights enforcement activities pertaining to Title VI;
3) Immediately ensure that all modal administrations are conducting Title VI onsite compliance reviews and investigations;
4) Establish a system for reviewing desk audit and onsite compliance reviews conducted by the modal administrations; and
5) Establish a single, uniform set of Title VI guidelines and operating procedures for conducting compliance reviews and investigations.[140]

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[133] *See* DOT/OS FY 1994 Implementation Plan, pp. 1–7.

[134] Ibid.

[135] Ibid., p. 8.

[136] DOT/OS FY 1994 Implementation Plan, p. 3.

[137] USCCR, *Enforcement of Equal Employment and Economic Opportunity Laws and Programs*, January 1993, p. 13.

[138] Ibid.

[139] Ibid.

[140] Ibid.

**TABLE 14.1**
**U.S. Department of Transportation Title VI Complaints**

| | 1984 | 1988 | 1992 | 1993 |
|---|---|---|---|---|
| Title VI | 56 | 34 | 19 | 36 |
| All complaints | 317 | 290 | 379 | 513 |
| Percentage | 17.7 | 11.7 | 5.0 | 7.0 |

Source: U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Transportation, Office of the Secretary, Q. 71, p. 45. DOT does not maintain data for the years before 1984.

In August 1993, the Commission wrote the Secretary of Transportation to express continuing concerns over the lack of Title VI civil rights enforcement at DOT.[141] The Commission's letter cited the deficiencies in enforcement and the lack of leadership by management at the departmental level and recommended that OCR take "immediate steps" to enforce Title VI vigorously and to assist modal administrations in establishing effective civil rights enforcement programs.[142] The letter also cited correspondence from advocacy groups concerning alleged discriminatory actions and impact within DOT's funded programs.[143]

The Secretary responded by relating actions that the Director of OCR had undertaken to remedy some of the problems identified and concerns raised by the Commission, including: 1) meetings with modal administrations; 2) release of compliance review information for certain fiscal years; and 3) an assessment of the staffing requirements to enforce an effective Title VI compliance process.[144]

However, the Commission's current study has found that little has changed since the Commission's 1993 report. According to DOT's own recent internal assessment, the Title VI enforcement process in OCR is "the most complicated, the most fragmented, and the most neglected at DOT."[145] Furthermore, "there is little knowledge, understanding or appreciation of the enormity of the DOT compliance universe, the insufficiency of staff to even marginally address mandates, or the vulnerability of DOT and its program recipients."[146] DOT's Inspector General found that "The Title VI area is virtually ignored by [OCR] and [operating administration civil rights] offices and addressed only with minimal effort." The Inspector General singled out the lack of postaward compliance reviews and the absence of outreach on Title VI as notably deficiencies.[147]

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[141] Bobby Doctor, Acting Staff Director, U.S. Commission on Civil Rights, letter to Federico Peña, Secretary of Transportation, Aug. 17, 1993.

[142] Ibid.

[143] The letter cited the Hispanic Coalition for Airport Fairness and the Nashville, Tennessee branch of the National Association for the Advancement of Colored People. *See* ibid.

[144] Federico Peña, Secretary of Transportation, Department of Transportation, letter to Bobby Doctor, Acting Staff Director, U.S. Commission on Civil Rights, Aug. 25, 1993.

[145] *Consolidation Options*, p. 8.

[146] Ibid., quoting Report of the DOT External Civil Rights Program Work Group, March 1994, p. i.

DOT, specifically OCR, continues to do almost nothing to enforce Title VI. Although DOT implements Title VI regulations and DOT's departmental orders spell out clearly the department's responsibilities, OCR continues to neglect its designated role.

## Findings and Recommendations

### DOT's Title VI Regulations

**Finding:** The U.S. Department of Transportation's (DOT) Title VI regulations form an adequate basis for its Title VI compliance and enforcement program. However, the regulations are outdated. As a result, they do not reflect recent Title VI developments, such as the Civil Rights Restoration Act of 1987 or the move to provide increasing amounts of Federal funds through block grant programs. Furthermore, the appendix listing DOT's federally funded programs may not reflect all of the programs currently funded by the Department. For instance, it does not include the FAA's airport development aid program or its airport improvement program.[148]

**Recommendation:** DOT should update its Title VI regulations to reflect recent changes that have affected Title VI enforcement, such as the enactment of the Civil Rights Restoration Act of 1987 and the tendency to distribute Federal funds through block grant programs. Furthermore, each year, DOT should publish an updated list of its federally funded programs in the *Federal Register*.

## Organization, Budget, Staffing, and Workload—Office of Civil Rights

### Organization

**Finding:** DOT's civil rights enforcement program has stagnated for the past several years as DOT planned and sought to implement a major departmental reorganization of its civil rights offices. DOT civil rights offices put plans and initiatives on hold as they awaited a final decision on how DOT's civil rights functions would be restructured. The prospect of upheavals resulting from the reorganization has delayed by several years any efforts by DOT to make significant improvements to its civil rights enforcement program.[149]

**Recommendation:** The Secretary of Transportation should exert personal leadership to ensure that the reorganization of DOT's civil rights offices does not impede DOT's civil rights program any longer. As the Department reorganizes, it should simultaneously take steps to enhance its day-to-day civil rights enforcement activities.

**Finding:** The current organizational structure of DOT's external civil rights enforcement program does not give the Office of Civil Rights (OCR) adequate control over the Department's Title VI enforcement program. Civil rights staff in the DOT modal administrations do not report to the Director of OCR; rather, they report to the DOT administrators. DOT has proposed consolidating all of DOT's external civil rights enforcement functions within OCR. DOT's 1996 budget request includes a request for funding to accomplish this consolidation.[150]

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[147] DOT Inspector General's *Draft Report*, p. 15.

[148] *See* pp. 505–07.

[149] *See* pp. 502–05.

[150] *See* p. 505.

**Recommendation:** DOT should continue to pursue and Congress approve funding for consolidation of DOT's external civil rights activities. Under the consolidation, OCR should consist of a headquarters office devoted to providing coordination and oversight for DOT's external civil rights activities and regional offices charged with carrying out day-to-day civil rights enforcement responsibilities.

The OCR headquarters external civil rights office should be separate from OCR's headquarters office assigned to internal civil rights activities. It should be modeled after the Department of Education's Office for Civil Rights. It should have three separate components devoted to policy development, program planning and data analysis, and oversight of OCR's regional offices' external civil rights activities. The policy development unit should be responsible for developing regulations, guidelines, policies, and procedures for DOT's external civil rights program and interacting with other government agencies. The program planning and data analysis office should prepare budgets and develop management and enforcement plans for DOT's external civil rights program, develop and maintain data systems to track DOT's civil rights activities, and conduct civil rights analyses of DOT's federally assisted programs. The oversight office should provide technical assistance and training to regional civil rights staff and conduct regular onsite and desk-audit reviews of OCR's regional civil rights offices.

OCR's regional offices should have separate units devoted to external civil rights compliance and enforcement activities. These units should be charged with conducting postaward desk-audit and onsite reviews of recipients, processing complaints of discrimination, conducting outreach and education, and providing technical assistance to recipients.

### Budget, Staffing, and Workload

**Finding:** Although OCR's budget is a separate line item in the Office of the Secretary's budget, DOT does not have the capability of tracking OCR's expenditures on various civil rights functions. Therefore, OCR does not have the information system necessary to support sound management decisionmaking.[151]

**Recommendation:** OCR should develop and implement an information management system that permits it to track its expenditures and workload separately for each civil rights statute and for different types of activities (e.g., complaint process, outreach and education, etc.). OCR should use the information management system to prepare an annual civil rights enforcement plan showing specifically what it intends to accomplish within the year and what resources it plans to use.

**Finding:** Out of a total of 21 full-time equivalent positions, OCR allocates just 1 to external civil rights compliance and enforcement activities. One staff person cannot perform all of the functions for which OCR is responsible.[152]

**Recommendation:** DOT must commit additional resources to OCR's external civil rights activities.

## Directives, Guidelines, Policies, and Procedures

**Finding:** DOT Order 1000.12 is a comprehensive civil rights directive that clearly specifies the Title VI responsibilities of OCR and the modal administrations. It covers most essential compliance and enforcement activities, including application reviews, employment covered by Title VI, compliance reviews, complaint investigation, recordkeeping and reports, and methods of obtaining informal resolutions. Thus, the order forms a sound basis for DOT's Title VI compliance and enforcement program.[153] However, DOT does not comply with large portions of the order.

**Recommendation:** DOT should conduct an analysis to determine how it could carry out fully DOT Order 1000.12. If the study determines that additional resources are needed, either in OCR or in the modal administrations, DOT should commit the needed resources to Title VI enforcement.

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[151] *See* p. 509.

[152] *See* p. 509.

[153] *See* pp. 511–12.

**Finding:** Except for issuing DOT Order 1000.12 and two more general civil rights directives, OCR has failed to fulfill its policy development role. It has issued no policy statements on Title VI. For instance, it has not issued a statement analyzing the implications of the Civil Rights Restoration Act for DOT's Title VI enforcement.[154]

**Recommendation:** OCR should actively engage in developing and issuing civil rights standards and policies for DOT. To do this, OCR needs a specialized policy development unit that does not have civil rights compliance and enforcement responsibilities.

## Process of Title VI Enforcement

### Outreach and Education

**Finding:** Although DOT Order 1000.12 gives OCR responsibility for conducting outreach and education, OCR has not performed outreach and education activities during the last 5 years.[155]

**Recommendation:** OCR should commence an active outreach and education program. OCR should develop a strategy to ensure that the public is informed about DOT's programs and their rights and responsibilities under Title VI. The strategy should outline the relative responsibilities of OCR and the modal administrations. OCR should be responsible for developing and disseminating informational materials, such as brochures and posters, in English and in other languages. The modal administrations should be responsible for ensuring that information on their programs and general information on Title VI is readily available to their recipients, program participants, intended beneficiaries, and the public.

### Technical Assistance

**Finding:** OCR provides technical assistance to the modal administrations only upon request. It does not provide technical assistance on a regular basis, nor does it provide technical assistance as changing circumstances warrant it.[156]

**Recommendation:** OCR should take a more active role in providing technical assistance to the modal administrations. Technical assistance should be offered on a regular basis, during the course of onsite oversight and monitoring reviews of the modal administration's Title VI programs and also when new circumstances warrant additional assistance. For instance, if Congress changes DOT's federally assisted programs into block grant programs, OCR should provide the modal administrations with technical assistance on how to enforce Title VI for block grant programs.

## Oversight of the Modal Administrations

**Finding:** Although oversight of the modal administrations is one of OCR's chief responsibilities, OCR has not provided any general oversight, monitoring, or coordination of its Title VI programs with the modal administrations or the administrations' regional and field office staff for at least the last 5 years. Thus, DOT does not evaluate the modal administrations to ensure that they are adequately enforcing Title VI and other civil rights statutes.[157]

**Recommendation:** OCR should actively carry out its coordination and oversight role. OCR should communicate regularly with the modal administrations, offering them policy interpretations, technical assistance, and staff training. OCR should require each modal administration to submit annual Title VI self-assessments, and OCR should review and evaluate these reports. In addition, OCR should conduct regular onsite monitoring and evaluation reviews of the modal administrations. These reviews should include interviews with staff in the modal administrations' civil rights offices, regional offices, and field offices; interviews with program participants; and onsite reviews of selected recipients. In conducting these reviews, OCR should evaluate the modal administrations' Title VI directives, policies, and procedures; their data collection, reporting, and analysis systems; the quality of their compliance reviews and complaint investigations; the training and experience levels of their staff; and their technical assistance and outreach and education programs. Onsite reviews should result in thorough reports evaluating and recommending improvements to the modal administrations' Title VI programs. Where necessary, OCR should offer technical assistance and provide staff training necessary to upgrade the programs.

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[154] *See* p. 512.

[155] *See* p. 513.

[156] *See* p. 513.

[157] *See* p. 510.

### Oversight of Continuing State Programs

**Finding:** Although many Title VI compliance functions are carried out by DOT's State recipients, OCR does not play a significant role in monitoring the Title VI programs in State or local agencies.[158]

**Recommendation:** OCR should take a more active role in monitoring the Title VI activities of DOT's State recipients. OCR should visit and evaluate the Title VI programs of State recipients in conjunction with onsite oversight and monitoring reviews of the modal administrations. Where OCR determines that the State programs are deficient, OCR should provide any necessary technical assistance and ensure that the modal administration funding the State recipient takes the necessary steps to ensure that States Title VI programs are adequate.

### Data Collection, Reporting, and Analysis

**Finding:** Although OCR incorporated data collection, reporting, and analysis in DOT Order 1000.12, it does not ensure that the modal administrations collect and analyze data, nor does it use data in evaluating the modal administrations' Title VI programs.[159]

**Recommendation:** OCR should ensure that all DOT modal administrations incorporate data collection, reporting, and analysis into their Title VI programs, as required by DOT Order 1000.12. OCR should review and assess the modal administrations' data systems during the course of onsite monitoring and evaluation reviews of the administrations' Title VI programs. In addition, OCR should require the modal administrations to incorporate an analysis of the data they receive from their recipients in their annual Title VI self-assessments. OCR should review these analyses to ensure that the modal administrations are making full use of data collection and analysis in their Title VI programs.

### Civil Rights Implementation Plans

**Finding:** In fiscal year 1994, OCR submitted a Civil Rights Implementation Plan for the first time in several years. The plan does not fulfill the objectives outlined in the U.S. Department of Justice's "Guideline for Agency Implementation Plans Required by Executive Order 12,250, 'Leadership and Coordination on Nondiscrimination Laws.'" It does not provide sufficient information for the Department of Justice or the public to gain an understanding of DOT's civil rights enforcement program; its goals and objectives are vague; and OCR is not using the plan as a management tool.[160]

**Recommendation:** OCR should develop its Civil Rights Implementation Plans in conformance with the Department of Justice guidelines. In particular, OCR's Civil Rights Implementation Plans should provide a broad outline of OCR's Title VI enforcement program, including its scope, its organization, its budget and staffing, and the extent to which it conducts various civil rights activities. Furthermore, the plans should develop the goals and objectives section and the progress report section in accordance with the Department of Justice's mandate that the plans be used as a management tool by OCR. Thus, goals and objectives should be precise, have specific timeframes for accomplishing them, and be based on a realistic assessment of budget and staff resources available for civil rights enforcement.

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[158] *See* p. 514.

[159] *See* p. 514.

[160] *See* pp. 514–15.

## Obligations of the Modal Administrations

DOT Order 1000.12 confers on each DOT modal administration the responsibility to ensure that its federally assisted programs are in compliance with Title VI. Each modal administration must develop and submit to OCR for review a Title VI program for each of its federally assisted programs, with procedures and requirements that ensure that its recipients are in compliance. The modal administrations are responsible for assigning sufficient personnel to "implement fully and ensure compliance with its civil rights program."[161]

### Preaward Reviews

DOT Order 1000.12 requires that each modal administration ensure that all applicants for financial assistance under its programs submit DOT's "Standard Title VI Assurance." Furthermore, the modal administration must review each application for funding and prepare a written determination as to whether the applicant is in compliance with Title VI and other civil rights statutes.[162] DOT Order 1000.12 further provides the types of information that the modal administration should require of applicants to assist it in reaching determinations of probable compliance or noncompliance.[163] When a modal administration cannot determine probable compliance based on a review of the information submitted by the applicant, the order directs the modal administration to conduct an onsite preaward review.[164]

The order provides that no application for assistance shall be approved "unless the office of civil rights of the [modal administration] has found in its written determination that the applicant is in probable compliance or that the project, program, or activity is consistent with the [administration's] Title VI program."[165] When an applicant is found in probable noncompliance, the order directs the modal administration to attempt to resolve the problem informally and reach a written preaward agreement specifying terms and conditions for the receipt of assistance.[166] The Director of OCR must review all findings of noncompliance.[167]

### Postaward Reviews

DOT Order 1000.12 directs each modal administration to:

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[161] DOT Order 1000.12., p. I–5.

[162] *Id.*, pp. I–5, I–7.

[163] *See* discussion on data collection and reporting requirements below.

[164] DOT Order 1000.12, pp. IV–3—IV–4.

[165] *Id.*, p. I–7.

[166] *Id.*, p. III–3.

[167] *Id.*, p. IV–4.

> establish and maintain an effective program of post-award compliance reviews with respect to programs and activities which have been furnished Federal financial assistance. Such reviews are to include periodic submission of compliance reports by recipients and onsite reviews.[168]

The order directs the modal administrations to review compliance reports[169] submitted by recipients to determine if recipients have potential compliance problems. When the modal administration suspects possible noncompliance, it should conduct an onsite compliance review of the recipient.[170]

Generally, the modal administrations' civil rights offices should conduct onsite compliance reviews.[171] Specifically:

> The review shall include personal interviews with persons in the applicant's or recipient's organization/beneficiaries. It may also include interviews with persons who have relevant information or views concerning the recipient. The reviewer shall also visit the project or facility site and obtain all statistical and documentary materials needed to make a determination of compliance or noncompliance. The findings, conclusions, and recommendations, with supporting rationale, should be set forth in a report.[172]

The modal administrations must develop standards for assessing applicants' and recipients' compliance status.[173]

## Complaint Processing

Until March 1995, the modal administrations were required by DOT Order 1000.12 to forward all complaints to the Director of OCR.[174] OCR had the responsibility of processing and investigating all complaints. However, the modal administrations were required to attempt to resolve complaints informally if possible.[175] Since March 1995, the modal administrations have had primary responsibility for processing Title VI complaints. However, they must consult with OCR when the complaints involve legal or policy issues not previously addressed by DOT, and they must keep OCR informed of the status of all complaints.[176]

## Data Collection and Reporting Requirements

DOT Order 1000.12 provides guidance on data collection activities. The order directs the modal administrations to "require information of applicants and recipients to determine compliance."[177]

The order specifically directs the modal administrations to require of each applicant for DOT assistance a "Title VI Assessment," which should include the following information:

> - A statistical breakdown by race, color, and national origin, sex and disability of persons within the federally assisted areas or the population eligible or likely to be served or affected by the project;

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[168] *Id.*, p. I–7. *See also Id.*, p. IV–1.

[169] *See* discussion below on data collection and reporting requirements for more discussion of the content of the compliance reports.

[170] DOT Order 1000.12, p. IV–5.

[171] *Id.*, p. IV–4.

[172] *Id.*

[173] *Id.*

[174] *Id.*, p. V–1.

[175] *Id.* p. V–2.

[176] DOT Interim Complaint Procedures.

[177] *Id.*, p. I–6.

- The projected users or beneficiaries of the project;
- The owners of property to be taken, and persons or businesses to be relocated or adversely affected as a result of the project;
- The present or proposed membership of any planning or advisory body which is an integral part of the program or project;
- The information concerning employment required by [chapter III of the order];
- The proposed location, and alternative locations, of any facilities to be constructed or used in connection with the project, together with data concerning the composition by race, color, and national origin, sex, and disability of the populations of the areas surrounding such facilities.[178]

The order also directs the modal administrations to collect information on lawsuits or complaints alleging discrimination against the applicant, any applications for financial assistance pending at other Federal agencies, and any civil rights compliance reviews done of the applicant or proposed subgrantees by another agency.[179]

With respect to an applicant's employment record, the order directs the modal administrations to collect from applicants and analyze "the information necessary to permit the operating element to make the determinations regarding the employment practices of the applicant necessary for a finding respecting probable compliance."[180] At a minimum, this information should include:

- A statistical breakdown by race, color, and national origin of that portion of the applicant's workforce that is or is likely to be involved in any manner, either directly or indirectly, in the preparation of the application for Federal financial assistance, the handling or use of such funds. The breakdown shall be by job titles, grouped as necessary for work of comparable difficulty and responsibility;
- A listing of the number and types of employment openings that are expected to be created in connection with the federally assisted work including those that will not be reimbursed directly from Federal funds;
- A cumulative listing of employment actions, including hirings, firings, promotions, layoffs, training courses, for the previous year in that portion of the applicant's workforce for which the breakdown is provided;
- An analysis of the available workforce in the area in which the applicant does or may reasonably recruit, expressed in terms of race, color, or national origin characteristics of the workforce; and
- A copy of any affirmative action plan pertaining to the applicant's employment practices.[181]

Finally, the order directs the modal administrations to collect semiannual compliance reports of all recipients and to prepare guidelines on the content of these reports.[182] The reports should update all information in the Title VI assessment and relate progress made by the recipient.[183]

## Federal Aviation Administration

The Federal Aviation Administration (FAA) is responsible for many aviation-related functions, including regulating air commerce to promote safety and a strong national defense, controlling the Nation's airspace and maintaining an air traffic control system, promoting civil aeronautics and aviation-related research, and developing programs to minimize adverse environmental effects of aviation.[184]

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[178] *Id.*, pp. IV-1—IV-2.

[179] *Id.*, p. IV-2.

[180] *Id.*, pp. III-2, III-3.

[181] *Id.*, p. III-3.

[182] *Id.*, p. IV-5.

[183] *Id.*

[184] Office of the Register and the National Archives and Records Administration, *The United States Government Manual 1994/95* (Superintendent of Documents: Washington, D.C., 1994), p. 462.

## Federally Assisted Programs

Although the FAA maintains that it administers only two federally assisted programs,[185] the United States Government's *Catalog of Federal Domestic Assistance* indicates that the FAA administers four such programs:

> The *airport improvement program* was created in 1979 to assist sponsors, owners, or operators of public-use airports in the development of a nationwide system of airports adequate to meet the needs of civil aeronautics.[186] The FAA provides airport improvement program assistance through project grants, and advisory services and counseling to States, counties, municipalities, U.S. territories and possessions, and other public agencies, including Indian tribes or pueblos and public and private owners of reliever airports.[187] In fiscal year 1993, gross obligations under the airport improvement program amounted to $1.8 billion to 1,434 new grant agreements.[188]
>
> The *airway science program* assists recognized colleges and universities in meeting the need for facilities and equipment for airway science curriculum students.[189] The types of assistance in the program include project grants and the use of property, facilities, and equipment.[190]
>
> *Aviation research grants* seek to encourage and support innovative and advanced research in areas of potential benefit to the long-term growth of civil aviation; research on the prevention of catastrophic failures; and research, development, and implementation of technologies and procedures to counteract terrorist acts against civil aviation.[191] Colleges, universities, and nonprofit institutions are eligible to receive aviation research grants; for-profit organizations are limited to grants that involve aviation security.[192]
>
> The *air transportation centers of excellence program* conducts long-term continuing research in specific areas of aviation-related technology.[193] The FAA provides the program assistance through project grants; use of property, facilities, and equipment; and the provision of specialized services. It restricts the assistance to colleges and universities with the financial resources to meet statutory requirements for matching Federal funds and maintenance of effort.[194]

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[185] U.S. Department of Transportation, Federal Aviation Administration, "Fiscal Year 1994 Civil Rights Implementation Plan," p. 2 (hereafter cited as DOT/FAA FY 1994 Implementation Plan).

[186] Office of Management and Budget and U.S. General Services Administration, *1993 Catalog of Federal Domestic Assistance* (Superintendent of Documents: Washington, D.C., 1993), vol. 1, p. 444.

[187] Ibid.

[188] DOT/FAA FY 1994 Implementation Plan, p. 10; Leon C. Watkins, Assistant Administrator for Civil Rights, Federal Aviation Administration, U.S. Department of Transportation, letter to Frederick D. Isler, Acting Assistant Staff Director for Civil Rights Evaluation, U.S. Commission on Civil Rights, Apr. 19, 1995, enclosure, p. 1 (hereafter cited as Watkins letter, enclosure).

[189] Ibid., p. 446.

[190] Ibid.

[191] Ibid.

[192] Ibid., p. 447.

[193] Ibid.

[194] Ibid.

## Organization, Budget, Staffing, and Workload

### Organization and Responsibilities

The Office of Civil Rights (FAA/OCR) at the FAA has primary responsibility for enforcement of Title VI.[195] In addition to Title VI, FAA/OCR has responsibility for enforcing other civil rights statutes pertaining to federally assisted and federally conducted programs and for conducting the FAA's internal (equal employment opportunity and affirmative action) civil rights activities. FAA/OCR is also responsible for administering the Administration's disadvantaged business program.[196] FAA/OCR is headed by the Assistant Administrator for Civil Rights, who reports directly to the Administrator of the FAA.[197]

In addition to FAA/OCR, the FAA's nine regional offices each have civil rights staff who carry out most of the FAA's day-to-day Title VI enforcement activities.[198] FAA/OCR does not have straight-line authority over the regional civil rights staff, who report to the administrators of the regional offices. Rather, FAA/OCR provides policy guidance to and establishes compliance review procedures for the regional administrators. FAA/OCR handles all complaints filed with the FAA.[199]

The Office of Airport Planning and Programming of the FAA, under the Associate Administrator for Airports, is responsible for ensuring that all grant agreements include Title VI assurances.[200] The Office of the Chief Counsel also has Title VI responsibilities.[201]

Several features of the organizational structure of civil rights at the FAA are likely to impede Title VI enforcement at the Administration. In particular, the head of FAA's civil rights office does not have direct authority over the civil rights staff performing the bulk of the FAA's day-to-day civil rights enforcement activities, who are regional staff and report to regional administrators. The FAA indicated that, although the Assistant Administrator for Civil Rights does not have line authority over the regional civil rights staff, the Assistant Administrator "represents the Administrator on Title VI matters" and therefore has the requisite authority over the FAA's regional civil rights staff.[202] However, the evidence that the FAA civil rights offices did not carry out

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[195] Ibid., p. 3.

[196] *See* ibid., pp. 1, 3. FAA/OCR is responsible for enforcing the following civil rights provisions: sections 505(d), 511(a), 511(h), and 520 of the Airport and Airway Improvement Act of 1982, Pub. L. No. 97–248, 96 Stat. 671–702 (codified as amended in scattered sections of 49 U.S.C.); section 30 of the Airport and Airway Development Act of 1970, Pub. L. No. 91–258, 84 Stat. 219 (codified as amended in scattered sections of 49 U.S.C.); Title IX of the Education Amendments Act of 1972, 20 U.S.C. §§ 1681–1688 (1988); and the Age Discrimination Act of 1975, 42 U.S.C. §§ 6101–6107 (1988). The FAA's Office of Airport Safety and Standards has responsibility for section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988 & Supp. V 1993).

[197] U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Transportation, Federal Aviation Administration, Q. 20, p. 17 (hereafter cited as DOT/FAA Survey); DOT/FAA FY 1994 Implementation Plan, p. 3.

[198] DOT/FAA FY 1994 Implementation Plan, p. 3.

[199] Ibid.

[200] DOT/FAA Survey, Q. 21, p. 17.

[201] Ibid., Q. 25(b), p. 19.

[202] Watkins letter, enclosure, p. 2. By FAA order, the Assistant Administrator for Civil Rights, formerly entitled the Director of Civil Rights, is "delegated authority to act for, represent and speak for the Administrator" on Title VI matters. U.S. Department of Transportation, Federal Aviation Administration, "Nondiscrimination in Federally Assisted Programs of FAA," Order 5100.30, Oct. 27, 1976, p. 4 (hereafter cited as DOT/FAA Order 5100.30).

FAA/OCR's plans to conduct two onsite compliance reviews in each region[203] belies this claim. A direct reporting relationship between the Assistant Administrator and the FAA's civil rights staff would likely result in a closer nexus between FAA/OCR's planning and the regional staff's execution of these plans.

Second, FAA/OCR is not only responsible for external civil rights enforcement, but also has responsibility for DOT's disadvantaged business enterprise program and internal equal employment opportunity matters. FAA/OCR's other responsibilities may make it difficult for FAA/OCR to focus the needed attention on Title VI enforcement activities.

One positive feature of the organizational structure of civil rights at the FAA, however, is that the Director of FAA/OCR reports directly to the Administrator. As a result, FAA/OCR has the necessary status within the FAA to ensure that civil rights enforcement is given the necessary attention.

### Budget, Staffing, and Workload

The FAA does not have a separate budget allocation for Title VI enforcement or external civil rights enforcement generally.[204] Thus, the FAA does not have in place an important management tool that would allow FAA/OCR to track expenditures in its various areas of responsibility, as well as make informed plans for future resource allocations. Furthermore, the FAA was unable to provide estimates of expenditures for several important categories.[205] In fiscal year 1993, the FAA allotted approximately $1.508 million of its $9 billion budget for civil rights enforcement, including both internal and external civil rights activities.[206]

According to the FAA, in 1981, DOT had a reduction in force that downsized FAA/OCR.[207] The FAA did not provide further information on the reduction in force.

In fiscal year 1993, FAA/OCR had 17 staff members, of whom 10 worked on internal civil rights matters and 2 on external civil rights enforcement.[208] The two staff members assigned to external enforcement provide guidance and direction to regional staff, and process the 5–10 external civil rights complaints the FAA receives each year.[209] The FAA's nine regional civil rights offices had a total of 54 full-time equivalent positions (FTEs).[210] Altogether, the FAA had 75 FTEs assigned to civil rights responsibilities.[211]

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[203] *See* discussion below, p. 531.

[204] Ibid., Q. 34, p. 28.

[205] Ibid., Q. 34, p. 29. The Commission requested information on budget expenditures for the following areas: 1) Total expenditures on Title VI civil rights programs; 2) Expenditures on Title VI preaward (desk-audit) reviews; 3) Expenditures for Title VI technical assistance; 4) Expenditures for Title VI training; 5) Expenditures for Title VI postaward (desk audits) reviews; 6) Expenditures for Title VI onsite compliance reviews; 7) Expenditures for Title VI complaint processing; and 8) Expenditures for Title VI administrative proceedings (e.g. sanctions, litigation). *See* ibid.

[206] Ibid., Q. 33, p. 26.

[207] Ibid., Q. 26, p. 21.

[208] Ibid. *See also* U.S. Department of Transportation, *Review of Civil Rights Consolidation Options*, April 1994 (hereafter cited as *Consolidation Options*) and Watkins letter, enclosure, p. 12.

[209] *Consolidation Options*, p. 9.

[210] DOT/FAA Survey, Q. 37, p. 33. DOT's task force report on consolidation options reported that the FAA regional offices had a total of 58 FTEs. *Consolidation Options*, Appendix 6.

[211] *Consolidation Options*, Appendix 6.

In fiscal year 1994, FAA/OCR had a total of 15 staff members, 14 of whom worked on internal civil rights matters. Therefore, FAA/OCR had only one FTE devoted to external civil rights enforcement activities, including Title VI, during that year.[212] The 1994 staffing levels reflect a decline in FAA/OCR's staff size since 1993.

The FAA indicated that its workload increased when two additional compliance responsibilities shifted to the administration.[213] First, in 1980 DOT issued a new departmental minority and women business enterprise (MBE/WBE) rule.[214] In 1988 the agency changed the MBE/WBE program to a disadvantaged business enterprise (DBE) program for federally assisted contracting.[215] Second, in 1992, DOT issued a new subpart F to the DBE rule, which established requirements for DBE participation in airport concessions.[216]

## Regulations, Guidelines, Policies, and Procedures

The FAA operates under the provisions of DOT's Title VI regulations.[217] The FAA indicated that DOT's Title VI regulations should be updated to include in the appendix, which lists the Department's federally assisted programs, two additional airport grant programs, the airport development aid program and the airport improvement program.[218]

In addition to DOT's Title VI regulations, the FAA's Title VI compliance and enforcement program operates under FAA Order 5100.30, "Nondiscrimination in Federally Assisted Programs of FAA." FAA Order 5100.30 details the responsibilities of the Administrator, the Assistant Administrator for Civil Rights, the regional civil rights staff, and other FAA offices.[219] It also specifies the obligations of FAA recipients.[220] Finally, it contains procedures for the FAA's postaward reviews of recipients and procedures for effecting compliance.[221] These procedures specify that major airport authorities are to be given onsite reviews annually. Lesser airports are to be given desk-audit reviews annually and onsite reviews periodically.[222] Although FAA Order 5100.30 requires the FAA to collect Title VI assurances for all applicants prior to releasing funding, it does not require the FAA to conduct preaward reviews of applicants.[223]

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[212] Leon C. Watkins, Assistant Administrator for Civil Rights, Federal Aviation Administration, U.S. Department of Transportation, memorandum to Antonio J. Califa, Director of Civil Rights, Office of the Secretary, U.S. Department of Transportation, "Request from U.S. Commission on Civil Rights," Sept. 26, 1994 (hereafter cited as Watkins memorandum).

[213] DOT/FAA Survey, Q. 27, p. 21.

[214] Ibid.

[215] Ibid.

[216] Ibid; Watkins letter, enclosure, p. 3.

[217] 49 C.F.R. Part 21 (1994).

[218] Ibid., Q. 4, p. 6. These two programs were created by legislation enacted after the promulgation of DOT's Title VI regulations, 49 C.F.R. Part 21. The airport development aid program was created by the Airport and Airway Development Act of 1970, Pub. L. No. 91-258, 84 Stat. 219 (codified as amended at 49 App. U.S.C. §§ 1701, 1711–1717 (1988), *repealed by* Pub. L. No. 97-248, § 523(a), 96 Stat. 324, 695). The airport improvement program later replaced the airport development aid program in 1982. *See* Pub. L. No. 97-248, 96 Stat. 324, 671 (codified as amended at 49 U.S.C. §§ 2201–2227 (1988 & Supp. V 1993)).

[219] DOT/FAA Order 5100.30, pp. 4, 5.

[220] Ibid., p. 7, Appendix 1.

[221] Ibid., pp. 11–26.

[222] Ibid., pp. 15–18.

FAA Order 5100.30, which was issued in 1976, before either the Supreme Court decision in *Grove City v. Bell*[224] or the enactment of the Civil Rights Restoration Act of 1987, contains provisions limiting the FAA's Title VI jurisdiction that are contrary to the Civil Rights Restoration Act. In particular, the order limits the FAA's jurisdiction to "that portion of the recipient which is actually involved in the project for which the grant is made. . . . The FAA's jurisdiction is limited to that portion of the governmental unit which is engaged in administering and operating airports."[225] In an example, the order indicates that, even though Chicago's department of aviation depends on that city's purchasing office because it does not have its own purchasing authority, the purchasing office is not under the FAA's jurisdiction.[226] However, the Civil Rights Restoration Act made clear that an agency's jurisdiction under Title VI is not limited as described in this example. Because discrimination in the purchasing office clearly could "infect" the grants made by the city's department of aviation, the FAA has clear jurisdiction over the purchasing office.

With respect to the coverage of employment discrimination by Title VI, the order holds, "Employment is covered only when discrimination in services to the public results from discriminatory hiring practices."[227] However, FAA/OCR appears generally to dismiss its authority under Title VI over employment discrimination without considering whether discriminatory hiring practices cause discrimination in services to the public.[228] The Assistant Administrator chided the Commission for "assum[ing] that Title VI provides authority to enforce employment nondiscrimination activities conducted under the [airport improvement program]," continuing that since "[p]rovision of employment opportunities is not considered by the FAA to be a primary objective of the [airport improvement program] . . ., Title VI and DOT regulation 49 CFR Part 21 have not been used by the FAA to review the employment practices of airport sponsors." Thus, the FAA does not appear to consider whether employment discrimination by airport sponsors harms program beneficiaries, such as airport users and individuals living in areas surrounding the airport. Furthermore, in not regarding the purpose of its programs to be the provision of employment, the FAA overlooks that persons employed in the construction and operation of an airport are major beneficiaries of the FAA's program and, as such, should be protected against employment discrimination by Title VI.[229]

In addition to FAA Order 5100.30, the FAA disseminates an advisory circular on "Civil Rights Requirements for the Airport Improvement Program."[230] The advisory circular explains to recipients their obligations under various civil rights statutes, provisions, and regulations, including Title VI. It provides specific examples of prohibited discrimination, such as, "There must be the same degree of service offered on a nondiscriminatory basis by: fixed base operators, restaurants, snack bars, gift shops, ticket counters, baggage handlers, car rental agencies, or limousines and taxis franchised by the airport sponsor, insurance underwriters, and other businesses catering to the public at the airport."[231] According to the FAA, the advisory circular, in addition to being "one of the FAA's main sources of technical assistance to airport sponsors," also is "regularly provided to program beneficiaries."[232]

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[223] *See* ibid., p. 9.

[224] 465 U.S. 555 (1984).

[225] DOT/FAA Order 5100.30, p. 11.

[226] Ibid., p. 12.

[227] Ibid., p. 3.

[228] *See* Watkins letter, enclosure, p. 5.

[229] Although the FAA disputes the application of Title VI to employment discrimination in its programs, it does consider employment discrimination under section 30 of the Airport and Airway Development Act of 1970. *See* Watkins letter, enclosure, p. 5.

[230] U.S. Department of Transportation, Federal Aviation Administration, "Civil Rights Requirements for the Airport Improvement Program," AC No. 150/5100–15A, Mar. 31, 1989 (hereafter cited as DOT/FAA Advisory Circular 150/5100–15A.

The FAA has an internal memorandum detailing its preaward review procedures.[233] In addition, in July 1994, the FAA issued guidelines indicating that revenue collected by a public agency from passenger facility charges does not constitute "Federal financial assistance" and therefore is not covered by Title VI.[234]

Thus, the FAA has issued some basic Title VI guidelines and procedures. However, the FAA has not been active in developing Title VI policies and has not responded to Title VI developments, such as the enactment of the Civil Rights Restoration Act of 1987. The FAA has neither issued policy guidance explaining the Civil Rights Restoration Act's clarification that jurisdiction under Title VI is not restricted to the specific program it funds, nor has it amended FAA Order 5100.30 to that effect.

## Process of Title VI Enforcement

### Preaward Reviews

Each Regional Airports Division must ensure that appropriate Title VI assurances are executed.[235] However, the FAA regional office civil rights staff are responsible for conducting preaward reviews.[236]

The FAA regional civil rights offices must conduct preaward reviews under FAA procedures when the project: 1) requires the preparation of an environmental impact statement; 2) involves the location of an airport, an airport runway, or major runway extension; or 3) causes the relocation of any residence, business, or tenant.[237] Preaward reviews include a desk-audit review of public hearing records, environmental impact statements, and other records, and when necessary, a site visit to the proposed project.[238]

A memorandum from the Director of FAA/OCR to the regional office directors outlines the FAA procedures for conducting Title VI application reviews.[239] The procedures apply to applications for assistance made under the Airport and Airway Improvement Act of 1982.[240] According to the memorandum, when a recipient or applicant selects the site or location of facilities, it may not do so if the purpose or effect is discrimination under any of its federally funded programs or if the purpose or effect defeats or substantially impairs the accomplishment of Title VI's objectives.[241]

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[231] Ibid., section 2(12)(b)(3).

[232] Watkins letter, enclosure, p. 4.

[233] DOT/FAA FY 1994 Implementation Plan, p. 4.

[234] U.S. Department of Transportation, Federal Aviation Administration, Office of Civil Rights, "Guidance on Civil Rights Requirements for the Passenger Facility Charge Program," July 1994.

[235] Watkins memorandum, p. 2.

[236] Dave Micklin, Compliance Officer, Office of Civil Rights, Federal Aviation Administration, U.S. Department of Transportation, interview in Washington, D.C., Sept. 20, 1994, p. 2 (hereafter cited as Micklin interview).

[237] DOT/FAA FY 1994 Implementation Plan, p. 4.

According to the 1994 Civil Rights Implementation Plan, the FAA did not perform preaward reviews for FAA Regulation 14 C.F.R. Part 152, Subpart E because of an absence of complaints. FAA also reported that if instances of noncompliance or the frequency of complaints increase, the policy will be "reexamined." Ibid.

[238] Ibid.

When determining compliance, the regional civil rights offices should consider the following factors, as appropriate:

> (1) Whether the location of the proposed project will provide service on a nondiscriminatory basis;
>
> (2) Whether the location will have the effect of unnecessarily denying access to any persons on the basis of prohibited discrimination;
>
> (3) If a public hearing was held, whether the sponsor considered any Title VI issues raised, and the conclusions made;
>
> (4) The determination of the Airport Division as to compliance of the project with other grant related requirements and the rationale or necessity of selecting the proposed location as opposed to the alternatives under consideration;
>
> (5) If an environmental impact statement was prepared, any data concerning the race or national origin of the community affected by the project;
>
> (6) If the project involves relocation, the steps taken or proposed by the applicant to guard against unnecessary impact on persons on the basis of race, color, or national origin; and
>
> (7) Whether persons will be displaced or relocated on a nondiscriminatory basis.[242]

If the regional civil rights office determines that a project is in noncompliance, it may defer action on the application pending completion of a hearing and other due process.[243]

The FAA conducted only 10 preaward reviews in 1992 and 1993: 5 in fiscal year 1992 and 5 more in fiscal year 1993.[244]

The FAA indicated that only one of its regional offices conducted a preaward review during fiscal year 1994. The Northwest Mountain Region conducted a Title VI review of the Port of Seattle in anticipation of a proposed major runway project.[245] The Central,[246] Western Pacific,[247] Southern,[248] Southwest,[249] and Great Lakes Regions[250] did not conduct preaward reviews.

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[239] Leon C. Watkins, Director of Civil Rights, Federal Aviation Administration, U.S. Department of Transportation, memorandum to regional directors, "Preaward Title VI Procedures," Apr. 1, 1983 (hereafter cited as DOT/FAA Preaward Procedures).

[240] 49 U.S.C. §§ 2204(d),2210(a)(17) (1994).

[241] DOT/FAA Preaward Procedures. Another criterion can be found in Appendix C(a)(1)(vii) which states, "Where there are two or more sites have equal potential to serve the aeronautical needs of the area, the airport sponsor shall select the site least likely to adversely affect existing communities. Such site selection shall not be made on the basis of race, color, or national origin." Ibid.

[242] Ibid.

[243] DOT/FAA FY 1994 Implementation Plan, p. 4.

[244] DOT/FAA Survey, Q. 41(e), p. 36. The FAA reported in its survey response that it had conducted five preaward reviews in 1993; however, its 1994 Civil Rights Implementation Plan indicated that it completed three preaward reviews in fiscal year 1993. *See* DOT/FAA FY 1994 Implementation Plan, p. 5.

Although the FAA has preaward review procedures, it does not have procedures in place to determine the effectiveness of its review process.[251] Furthermore, the FAA does not conduct a sufficient number of preaward reviews to ensure that its federally funded projects are in compliance with Title VI.

### Postaward Desk-Audit and Onsite Compliance Reviews

The FAA does not comply with its own order requiring annual onsite postaward compliance reviews of some airports and, for other airports, annual desk-audit reviews and periodic onsite reviews.[252]

The FAA does not conduct postaward desk-audit reviews.[253] Theoretically, the FAA's distribution of Federal funds to improve and build airports should trigger routine reviews of the recipients' compliance with Title VI.[254] However, review files are incomplete because they do not contain information pertaining to the population characteristics of a covered area, personnel policies, training programs, or referrals to other recipients.[255]

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[245] Marie Portis, External Program Manager, Northwest Mountain Region, Federal Aviation Administration, memorandum to Leon C. Watkins, Assistant Administrator for Civil Rights, Federal Aviation Administration, U.S. Department of Transportation, "Request from U.S. Commission on Civil Rights," Aug. 30, 1994, p. 3. (hereafter cited as Portis memorandum).

[246] Johnnie Terry-Flemming, Manager, Civil Rights Staff, Central Region, Federal Aviation Administration, U.S. Department of Transportation, memorandum to Leon C. Watkins, Assistant Administrator for Civil Rights, Federal Aviation Administration, U.S. Department of Transportation, "Request from U.S. Commission on Civil Rights," Sept. 13, 1994, p. 2 (hereafter cited as Terry-Flemming memorandum).

[247] Rudy Andrade, Manager, Civil Rights Staff, Western Pacific Region, Federal Aviation Administration, U.S. Department of Transportation, memorandum to Dave Micklin, Compliance Officer, Office of Civil Rights, Federal Aviation Administration, U.S. Department of Transportation, Aug. 29, 1994, p. 2 (hereafter cited as Andrade memorandum).

[248] Lawrence E. Moore, Civil Rights Officer, Southern Region, Federal Aviation Administration, U.S. Department of Transportation, memorandum to Leon C. Watkins, Assistant Administrator for Civil Rights, Federal Aviation Administration, U.S. Department of Transportation, "Request from U.S. Commission on Civil Rights," Aug. 26, 1994, p. 2 (hereafter cited as Moore memorandum).

[249] Arturo R. Montoya, Manager, Civil Rights Staff, Southwest Region, Federal Aviation Administration, U.S. Department of Transportation, memorandum to Leon C. Watkins, Assistant Administrator for Civil Rights, Federal Aviation Administration, U.S. Department of Transportation, "Request from U.S. Commission on Civil Rights," Aug. 26, 1994, p. 1 (hereafter cited as Montoya memorandum).

[250] Bonnie C. Pankalla, Manager, Civil Rights Division, Great Lakes Region, Federal Aviation Administration, U.S. Department of Transportation, memorandum to Leon C. Watkins, Assistant Administrator for Civil Rights, Federal Aviation Administration, U.S. Department of Transportation, "Request from U.S. Commission on Civil Rights," Aug. 25, 1994, p. 3 (hereafter cited as Pankalla memorandum).

[251] Watkins memorandum, p. 2.

[252] DOT/FAA Order 5100.30, pp. 15–18.

[253] *See* DOT/FAA Survey, Q. 45, p. 40.

[254] U.S. Commission on Civil Rights, *Enforcement of Equal Employment and Economic Opportunity Laws and Programs Relating to Federally Assisted Transportation Projects*, January 1993, p. 2 (hereafter cited as USCCR, *Enforcement of Equal Employment and Economic Opportunity Laws and Programs*).

Similarly, the FAA does not conduct many onsite compliance reviews. The Commission's 1993 report on DOT's civil rights enforcement activities indicated that the "FAA devotes most of its civil rights enforcement resources to conducting DBE compliance reviews and does not vigorously enforce Title VI or DOT Order 1000.12."[256] Little has changed since then. The FAA did not conduct any onsite compliance reviews in fiscal year 1992[257] and did one such review during fiscal year 1993.[258] In fiscal year 1994, the FAA did not conduct any onsite compliance reviews. Although the FAA indicated that it planned for each regional office to complete two reviews in fiscal year 1994,[259] the Western Pacific, Southern, Great Lakes, Central, Southwest, and Northwest Mountain Regions each did no reviews.[260]

The regional offices attributed the failure to conduct compliance reviews to financial and human resource limitations and an increased workload, owing primarily to the DBE program.[261] However, FAA/OCR appeared to justify the small number of reviews by pointing out that "during the past 20 years, the FAA has rarely discovered instances of discrimination in the provision of services or benefits to the airport public in violation of Title VI."[262]

### Complaint Investigations

The FAA coordinates its complaint processing with the Office of the Secretary's OCR.[263] The FAA has received very few Title VI complaints in recent years. During each of the past 2 fiscal years, the FAA received two Title VI complaints.[264]

In the one resolved Title VI complaint, the FAA obtained a commitment from the airport to:

- make available a tour of a historical black cemetery on the airport property; and
- abide by DOT's regulations at 49 C.F.R. Parts 24 and 25, "Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally Assisted Programs;[265]

### Deficiencies, Remedies, and Sanctions

The FAA has not found many instances of discrimination in its programs.[266] However, the FAA

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[255] DOT/FAA Survey, Q. 66, p. 48.

[256] USCCR, *Enforcement of Equal Employment and Economic Opportunity Laws and Programs*, p. 7.

[257] DOT/FAA Survey, Q. 68, p. 49.

[258] Ibid., Q. 68(b), p. 49. *See also* DOT/FAA FY 1994 Implementation Plan, FY 1993 Workload and Performance Data, p. 20. The FAA subsequently indicated that it had conducted two compliance reviews in fiscal year 1993. Watkins letter, enclosure, pp. 5–6.

[259] DOT/FAA FY 1994 Implementation Plan, p. 5.

[260] Andrade memorandum, p. 2; Moore memorandum, p. 2; Pankalla memorandum, p. 3; Terry-Flemming memorandum, p. 3; Montoya memorandum, p. 1; Portis memorandum, p. 3. Subsequently, the FAA reported that it had conducted three onsite compliance reviews during fiscal year 1994. Watkins letter, enclosure, pp. 5–6.

[261] Andrade memorandum, p. 2; Moore memorandum, p. 2; Pankalla memorandum, p. 2; Terry-Flemming memorandum, p. 3; Montoya memorandum, p. 1; and Portis memorandum, p. 3.

[262] Watkins letter, enclosure, p. 6.

[263] Micklin interview.

[264] DOT/FAA Survey, Q. 71, p. 52. The FAA's fiscal year 1994 Civil Rights Implementation Plan indicated that it received three Title VI complaints in fiscal year 1993. DOT/FAA FY 1994 Implementation Plan, Workload and Performance Data, pp. 12–13.

[265] Ibid., pp. 7–8.

[266] Watkins letter, p. 6.

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reviews have exposed administrative shortcomings:

1) Failure by the airport operator to display nondiscrimination posters in the main areas of terminal buildings;

2) Failure by the operator to have available a copy of the regulations for any members of the public requesting it;

3) Failure by the airport operator to include nondiscrimination provisions in contracts and leases in accordance with Title VI provisions; and

4) Failure by the airport operator to forward complaints to the FAA.[267]

According to the FAA, none of its remedies "depended on whether the recipients achieved numerical objectives or other forms of proportionality.[268] The FAA has not imposed sanctions, because all issues were resolved informally.[269]

## Outreach, Education, and Technical Assistance

The FAA advertises program information at covered airports through posters stating that discrimination based on race, color, national origin, sex, creed, or handicap in public services and employment opportunities is prohibited.[270] The FAA is the only DOT modal administration that publicizes program information in a language other than English.[271] The FAA requires recipients to display a poster in airports' public areas, stating in English and Spanish that discrimination is prohibited in the airport's operations.[272] The poster also indicates that complaints of employment or services discrimination may be filed with FAA/OCR.[273] The FAA also provides information on Title VI, including copies of its regulations and advisory circular, in its correspondence with individuals who wish to file a complaint of discrimination.[274]

Technical assistance, which is coordinated through the FAA's Office of the Chief Counsel, usually includes the interpretation of civil rights regulations, as well as the distribution of its advisory circular.[275] The FAA regional offices have primary responsibility for providing technical assistance to recipients,[276] and they do this principally during compliance reviews.[277] Since regional offices do not conduct frequent compliance reviews, the amount of technical assistance most recipients receive is limited to receipt of the FAA's advisory circular. Although the advisory circular provides basic information on recipients' compliance requirements, it is not sufficient to assist recipients in recognizing some forms of noncompliance, particularly instances of adverse impact discrimination.[278]

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[267] DOT/FAA Survey, Q. 67, p. 49.

[268] DOT/FAA FY 1994 Implementation Plan, pp. 7–8.

[269] Watkins letter, enclosure, p. 7.

[270] Ibid., Q. 46, p. 41.

[271] DOT/FAA Survey, Q. 47, p. 41. The FAA publicizes information in Spanish.

[272] DOT/FAA FY 1994 Implementation Plan, p. 3.

[273] Ibid.

[274] Watkins memorandum, p. 3; Watkins letter, enclosure, p. 10.

[275] Ibid., p. 3.

[276] Micklin interview, p. 2.

[277] DOT/FAA FY 1994 Civil Rights Implementation Plan, p. 5.

## Staff Training

In theory, the Office of the Secretary's OCR and FAA/OCR conduct training for immediate civil rights staff.[279] FAA/OCR and the Office of Airport Planning and Programming provide training for program managers, contract officers, and project officers.[280] State and local agencies, as well as recipient staff, receive training from the Office of the Secretary's OCR, FAA/OCR, the Office of Airport Planning and Programming, and the regional civil rights staffs and airport divisions.[281] In practice, however, FAA/OCR's civil rights compliance officer provides most of the training for new civil rights staff members.[282] Whether any substantial training actually occurs, however, is unclear.

## Monitoring State Title VI Enforcement

FAA/OCR and an individual designated by the particular State or local agency have responsibility for monitoring the activities of the State and local agencies.[283] Recipients cannot report their Title VI enforcement activities through self-assessment plans.[284]

According to the Assistant Administrator for Civil Rights, the only FAA subrecipients "are those which participate in the State Block Grant Pilot Program authorized by the 1987, 1990, and 1992 amendments to the Airport and Airway Improvement Act."[285] To date, FAA/OCR has participated in one evaluation of a State block grant program.[286]

## Data Collection, Reporting Requirements, and Analysis

The FAA collects standard DOT Title VI assurances from grant applicants.[287] However, the FAA does not require recipients to assess annually minority participation in each program and compare those figures with the established targets.[288] Furthermore, the FAA does not require recipients to develop a system for establishing base data or to submit annual reports.[289]

According to the FAA's Assistant Administrator for Civil Rights, his office rejected the idea of instituting a data collection and analysis system as infeasible. He argued that it would be costly and burdensome to collect information on the race, color, and national origin of airport passengers. Furthermore, he questioned what sort of data analysis to conduct once the data were collected. He indicated that comparing the racial and ethnic background of passengers to that of a target population was impractical, since it was not obvious which target population to use. Furthermore, he indicated that if minorities were underrepresented among airport users relative their percentage in the target population, it would not indicate discrimination by the airport.[290] The Assistant Administrator's objections to establishing a data collection and analysis system are misplaced. Data on airport users could be gathered through occasional surveys, rather than through collecting data on every airport passenger. Furthermore, the data collection and analysis system could also be used to support the FAA's preaward reviews. For instance, before granting funds for airport improvement projects, the FAA could require applicants to submit demographic data on the affected community.

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[278] *See* discussion, p. 527, above.

[279] DOT/FAA Survey, Q. 25(i), p. 20.

[280] Ibid.

[281] Ibid.

[282] Micklin interview, p. 3.

[283] DOT/FAA Survey, Q. 25(m), p. 21.

[284] Ibid., Q. 31, p. 24.

[285] Watkins memorandum, p. 2. Implementing regulations for the State block grant pilot program are found in 14 C.F.R. Part 156 (1993). Under this regulation, States assume responsibility for administration of grants at other than primary airports.

[286] Watkins memorandum, p. 2. This evaluation took place in Illinois, and according to the memorandum: "The FAA is not aware of any instances of noncompliance on the part of subgrantees participating in the program. The FAA does not require subgrantees to submit Title VI reports." Ibid.

[287] DOT/FAA Survey, Q. 56, p. 44.

[288] Ibid., Q. 61, p. 46.

[289] Ibid., Q. 59, p. 45, Q. 62, p. 47.

The absence of a data collection and reporting system by the FAA is a serious deficiency in its Title VI enforcement program. Not only does the FAA violate DOT Order 1000.12,[291] but, without adequate data, it is unable to conduct meaningful analyses of the compliance status of its recipients.

## Civil Rights Implementation Plans

The FAA developed Civil Rights Implementation Plans for distribution to the civil rights offices in its regional offices for the years 1992 and 1993.[292] In addition to these plans, the Commission obtained a copy of the FAA's 1994 Civil Rights Implementation Plan from the U.S. Department of Justice. Although the plan follows the format of the Department of Justice's Civil Rights Implementation Plan guidelines,[293] the plan did not fulfill the three purposes envisioned by the Department of Justice.[294] The plan does not describe the FAA's civil rights implementation and enforcement program in sufficient detail. For instance, it does not indicate how many staff in which offices are assigned to external civil rights activities. Although it discusses the FAA's approach to most of the major activities, these discussions rarely amount to more than one sentence. They are not sufficiently in depth for the Department of Justice to make an assessment of the FAA's civil rights compliance and enforcement program.[295]

Although the FAA maintains that it uses the plan as a management tool,[296] the plan does not contain detailed information about the FAA's budget, staffing, workload, and resources, or indicate that the goals and objectives were developed based on an analysis of this information.[297] Thus, the plan does not constitute a civil rights enforcement plan.

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[290] Watkins letter enclosure, p. 9.

[291] *See* pp. 522–33 above for a discussion of the data collection and reporting requirements in DOT Order 1000.12.

[292] The Commission received three plans from the FAA: U.S. Department of Transportation, Federal Aviation Administration, "Fiscal Year 1992 Civil Rights Implementation Plan;" U.S. Department of Transportation, Federal Aviation Administration, "Fiscal Year 1993 Civil Rights Implementation Plan;" and DOT/FAA FY 1994 Implementation Plan.

[293] U.S. Department of Justice, "Guideline for Agency Implementation Plans Required by Executive Order 12250, 'Leadership and Coordination of Nondiscrimination Laws,'" (no date), pp. 4–11 (hereafter cited as DOC Guideline for Agency Implementation Plans).

[294] DOC Guideline for Agency Implementation Plans, pp. 3–4. *See* chapters 3 and 4 for a discussion of these purposes.

[295] *See* DOT/FAA FY 1994 Implementation Plan, pp. 1–6.

[296] Watkins letter, enclosure, p. 10.

[297] *See* DOT/FAA FY 1994 Implementation Plan.

The plan indicated that the FAA's long-range goal was to enforce the regulations related to nondiscrimination in federally assisted programs.[298] It listed a number of major objectives including:

1) Resolution of all outstanding complaints by the end of fiscal year;

2) Review of preapplications for DOE projects meeting preaward Title VI criteria;

3) Hold two regional meetings to discuss agency policies;

4) Provide any additional training needed by means of two regional visits;

5) Request that each region conduct two comprehensive postaward Title VI reviews;

6) Issue guidance concerning the applicability of 49 C.F.R. Part 21 to PFC-funded projects; and

7) Disseminate technical assistance materials to ensure that recipients, their tenants, and contractors that provide services to the public adhere to nondiscrimination provisions of grant agreement assurances and lease clauses.[299]

The short-term objectives for fiscal year 1994 were sufficiently specific and incorporated milestones for completing them, as required by the Department of Justice.

## Findings and Recommendations

### Organization, Budget, Staffing, and Workload

#### Organization

**Finding:** The organizational structure of civil rights enforcement at the Federal Aviation Administration (FAA) has several deficiencies. First, FAA's Office of Civil Rights (FAA/OCR) does not have a separate unit devoted to external civil rights enforcement activities, including Title VI. As a result, resources for Title VI enforcement have declined as other civil rights enforcement activities, such as DOT's disadvantaged business enterprise program, took precedence. Second, the regional staff, who carry out most of the day-to-day civil rights enforcement activities, do not report to the Director of FAA/OCR. Third, the regional staff are not specialized, and thus none is able to develop sufficient expertise and focus sufficient attention to Title VI matters to ensure adequate Title VI enforcement. One positive feature of the organizational structure of civil rights enforcement at the FAA is that the Director of FAA/OCR reports directly to the Administrator of FAA.[300]

**Recommendation:** The FAA should restructure its civil rights enforcement so that all staff engaged in civil rights enforcement activities, including staff in the FAA regions, report to the Director of FAA/OCR. Furthermore, the FAA should subdivide FAA/OCR into separate units working on internal civil rights enforcement, external civil rights enforcement, and DOT's disadvantaged business and historically black college programs. Regional staff should also have specialized functions. The FAA should retain the current organizational position of FAA/OCR, with the Director reporting directly to the Administrator.

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[298] The plan also included a goal that was not related to Title VI enforcement.

[299] DOT/FAA FY 1994 Implementation Plan, p. 7.

[300] *See* pp. 525.

### Budget, Staffing, and Workload

**Finding:** FAA/OCR does not have the capability of tracking its Title VI expenditures separately from its expenditures on other civil rights activities. Furthermore, it cannot break down its expenditures by civil rights enforcement activities, such as complaint investigations, compliance reviews, outreach and education, and training. Thus, FAA/OCR does not have in place an important management tool for that is essential for planning effective Title VI enforcement.[301]

**Recommendation:** FAA/OCR should develop and implement an information management system that allows it to track its expenditures, resource allocations, and workload across civil rights statutes and types of compliance and enforcement activities. FAA/OCR should use this information management system in preparing an annual enforcement plan that includes specific goals and objectives in each of its program areas and assigns specific resources to accomplish them. Furthermore, FAA/OCR should use the system to analyze its resources in terms of its workload, and to determine if resources can be shifted from one activity to another or whether additional resources are needed for FAA/OCR to enforce Title VI and other civil rights statutes effectively.

**Finding:** In fiscal year 1994, FAA/OCR had only one staff person devoted to external civil rights enforcement, including Title VI, down from two staff persons the previous years. One person is not sufficient for FAA/OCR to perform its oversight and coordination role as well as investigate all external civil rights complaints for FAA-funded programs.[302]

**Recommendation:** FAA/OCR should assess the number of civil rights staff it would need to fulfill its external civil rights oversight coordination role and carry out its external complaint investigation responsibilities effectively. In addition to handling complaints, these responsibilities include providing technical assistance and training to the FAA regional civil rights staff, implementing an outreach and education program, and monitoring the FAA regional staff's performance of their external civil rights compliance and enforcement functions. FAA/OCR should consider whether it is possible to divert the necessary resources from its other civil rights activities, and, if not, it should request additional resources to carry out its mandate.

## Directives, Guidelines, Policies, and Procedures

### Directives

**Finding:** FAA Order 5100.30 details the responsibilities of FAA components and of FAA recipients and lays out procedures for conducting postaward reviews. Thus, it constitutes a basis for the FAA's Title VI enforcement program. However, it has language limiting the FAA's jurisdiction under Title VI to operators of airports that is inconsistent with Title VI as clarified by the Civil Rights Restoration Act of 1987. Furthermore, the order does not clearly indicate the extent of the FAA's jurisdiction over employment discrimination under Title VI.[303]

**Recommendation:** The FAA should revise FAA Order 5100.30 to be consistent with the Civil Rights Restoration Act of 1987. Specifically, the order should clarify that the FAA's Title VI jurisdiction extends beyond the specific part of a recipient that is receiving FAA funds to all of the recipient's programs. Furthermore, given the narrow interpretation of the FAA's jurisdiction taken by FAA/OCR, the FAA should revise the order to clarify that it will investigate employment discrimination under Title VI and that employment discrimination violates Title VI if it has the effect of harming program beneficiaries, including airport employees, based on their race, color, or national origin.

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[301] *See* p. 525.

[302] *See* pp. 525–26.

[303] *See* pp. 527–28.

### Guidelines

**Finding:** The FAA has not issued Title VI guidelines for its programs, as required by the U.S. Department of Justice.[304]

**Recommendation:** FAA/OCR should develop Title VI guidelines for each of its federally assisted programs detailing the standards for compliance with Title VI and the responsibilities of FAA recipients. The guidelines should include detailed requirements for complaint processing; public outreach and education; data collection, reporting, and analysis; and preparation of Title VI self-assessments.

## Process of Title VI Enforcement

### Preaward Reviews

**Finding:** The FAA has a comprehensive memorandum detailing preaward procedures, including a detailed list of the factors that regional civil rights offices should consider in determining whether an applicant is in compliance with Title VI. However, the FAA conducts very few preaward reviews.[305]

**Recommendation:** The FAA regional civil rights staff should conduct indepth preaward reviews of all applicants for major amounts of FAA funding. These preaward reviews should follow the FAA procedures. FAA/OCR should monitor the quality of the preaward reviews to see that they are adequate to ensure that the FAA's federally funded projects are in compliance with Title VI.

### Postaward Desk-Audit Reviews

**Finding:** The FAA does not conduct postaward desk-audit reviews, nor does it have in place a data collection system that would support such reviews.[306]

**Recommendation:** The FAA should implement a data collection system that gathers sufficient information from its recipients for it to conduct postaward desk-audit reviews of its recipients. Thus, the FAA should require that recipients submit annual Title VI self-assessments and that they provide additional data on their programs, as described in the recommendation under data collection and analysis below. The FAA should implement a postaward desk-audit program to review each recipient annually for compliance with Title VI to target recipients for onsite compliance reviews.

### Onsite Compliance Reviews

**Finding:** The FAA has not conducted any onsite compliance reviews within the last 2 fiscal years.[307]

**Recommendation:** The FAA should ensure that, along with postaward desk-audit reviews, its regional offices conduct postaward onsite compliance reviews of all recipients of major funding on a regular basis. FAA/OCR should develop procedures for selecting recipients for review and for conducting the reviews and, in annual planning, set a target numbers of reviews to be conducted by the regional offices. FAA/OCR should also evaluate periodically the quality of the regional offices' reviews and provide technical assistance where necessary.

### Outreach and Education

**Finding:** The FAA's outreach and education activities are limited to requiring recipients to display a nondiscrimination poster in FAA-funded airports.[308]

**Recommendation:** FAA/OCR should develop and implement a comprehensive outreach and education strategy to inform recipients, program participants, affected populations, and the public about its federally funded programs and the nondiscrimination requirements of Title VI. FAA/OCR should incorporate in its directive (see recommendation on directives, guidelines, policies, and procedures) specific outreach and education requirements for the regional civil rights staff and for FAA recipients.

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[304] *See* chap. 3, pp. 72–75.

[305] *See* pp. 529–30.

[306] *See* p. 531.

[307] *See* p. 532.

[308] *See* p. 533.

### Technical Assistance

**Finding:** The FAA regional offices are responsible for providing technical assistance to FAA recipients. However, because such assistance is provided primarily during compliance reviews, of which the FAA conducts very few, the FAA's technical assistance program does not reach all of its recipients.[309]

**Recommendation:** FAA/OCR should expand its Title VI technical assistance program to ensure that recipients receive technical assistance regularly, not just during onsite compliance reviews. FAA/OCR should offer technical assistance proactively as new developments arise or as it discovers problems that are common across recipients. Technical assistance should cover data collection and reporting requirements as well as recipients' obligations towards intended beneficiaries of the FAA's federally assisted programs.

## Staff Training

**Finding:** The FAA provides its civil rights staff, both in OCR and the regions, with almost no formal civil rights training.[310]

**Recommendation:** The FAA should provide, on a regular basis, comprehensive formal civil rights training, including training on Title VI, to its civil rights staff. FAA/OCR, with the assistance of the Office of the Secretary's OCR, should develop formal training modules to be used in the training.

## Oversight of State Title VI Enforcement

**Finding:** Although the FAA administers a pilot State block grant program under the Airport and Airway Improvement Act, it has only participated in evaluating one State. Furthermore, the FAA does not have in place a requirement that State recipients submit Title VI self-assessments to the FAA for review and evaluation.[311]

**Recommendation:** The FAA should develop procedures (or guidelines) for ensuring that States operating State block grant programs are in compliance with Title VI. The procedures should spell out clearly the relative responsibilities of the FAA and the States in the following areas: complaints, preaward reviews of subrecipients, postaward reviews of subrecipients, technical assistance, and public outreach and education. In addition, the procedures should require the States to submit annual Title VI self-assessments to be reviewed and evaluated by FAA civil rights staff and should require the FAA to conduct periodic onsite evaluation reviews of the States' Title VI compliance programs. The procedures should address the need for the States to collect data from their subrecipients and include analyses of the data in their annual Title VI self-assessments. The FAA should use the Federal Highway Administration's Title VI regulations as a model for these procedures/guidelines.

## Reporting Requirements, Data Collection, and Data Analysis

**Finding:** The FAA does not have a system for collecting data from recipients and analyzing the data as part of its Title VI compliance program. Not only is this a violation of DOT Order 1000.12, but, without adequate data, the FAA is unable to conduct meaningful civil rights analyses of the compliance status of its recipients.[312]

**Recommendation:** FAA/OCR should incorporate in guidelines for each of the FAA's federally assisted programs the data reporting requirements of recipients sufficient to permit the FAA to make an adequate evaluation of their compliance status. The specific data to be collected should depend on the program. For instance, the data reporting requirements for a recipient receiving funding for a large airport project should include data on communities affected by the location of the project, whereas data reporting requirements for a university receiving funding to conduct aviation-related research will require data on the college's employee and student bodies. FAA/OCR should receive these data on an annual basis and use them to conduct postaward desk-audit reviews of recipients as well as general analyses of the FAA's federally funded programs to ensure that FAA funds are distributed equitably with regard to race, color, and national origin.

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[309] See pp. 533–34.

[310] See p. 534.

[311] See p. 534.

[312] See p. 535.

### Civil Rights Implementation Plans

**Finding:** The FAA's fiscal year 1994 Civil Rights Implementation Plan does not fulfill the purposes envisioned by the U.S. Department of Justice in its "Guideline for Agency Implementation Plans Required by Executive order 12250, 'Leadership and Coordination of Nondiscrimination laws.'" It does not describe the FAA's civil rights implementation and enforcement program in sufficient detail. It gives no information on the FAA's budget and staff for external civil rights activities. In addition, the FAA is not using it as a management tool. However, the goals and objectives section did meet the Department of Justice requirements. In particular, the goals were specific, achievable, and incorporated milestones for completing them.[313]

**Recommendation:** The FAA should improve its Civil Rights Implementation Plans to conform fully to the Department of Justice's guideline. In particular, the plans should describe more fully the FAA's civil rights implementation and enforcement program, including providing information on FAA/OCR and the regional offices' civil rights staffing and budget. In addition, the FAA should use the plans in its management planning. The plan should be developed as a civil rights enforcement plan. It should contain specific goals and objectives with timeframes for achieving them. These goals and objectives should be connected clearly to a discussion of the FAA's available staff and resources.

## Federal Highway Administration

The Federal Highway Administration (FHWA) is responsible for administering DOT's highway transportation programs. It oversees the Nation's highway systems and coordinates highway transportation with other transportation systems. In carrying out its responsibilities, the FHWA considers the impacts of highway development and travel; transportation needs; engineering and safety aspects; social, economic, and environmental effects; and project costs.[314]

### Federally Assisted Programs

The FHWA administers four federally assisted programs:

> The *highway planning and construction program* helps State highway agencies develop an integrated, interconnected transportation system for interstate commerce and travel by constructing and rehabilitating the interstate highway system and the national highway system.[315] The FHWA distributes funds for this program through formula grants and project grants to State highway/transportation agencies and, in some instances, Federal agencies.[316]

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[313] *See* chapter 3, pp. 89–93.

[314] Office of the Federal Register and the National Archives and Records Administration, *The United States Government Manual, 1994/95* (Superintendent of Documents: Washington, D.C., 1994), p. 464.

[315] Office of Management and Budget and U.S. General Services Administration, *1993 Catalog of Federal Domestic Assistance* (Superintendent of Documents: Washington, D.C., 1993), vol. 1, p. 450

[316] Ibid.

The *highway training and education program* develops and administers, in cooperation with the highway community, fellowships, educational training, and technical assistance programs for DOT, the FHWA, State and local highway agency employees, and private members of national and international organizations.[317] Eligible beneficiaries include employees of State and local highway agencies engaged in work of interest to the United States.[318]

The *motor carrier safety program* protects the public from risks inherent in commercial vehicle operations on the highways and minimizes risks involved in moving hazardous materials over public highways.[319] Assistance includes investigation of complaints open to the general public and training limited to State and local police, rescue, and firefighting units.[320]

The *motor carrier safety assistance program* seeks to reduce the number and severity of accidents and hazardous material incidents involving commercial motor vehicles by substantially increasing the level of enforcement activity and the likelihood of detecting and correcting safety defects, driver deficiencies, and unsafe carrier practices.[321] The FHWA provides funds through formula grants.[322]

## Organization, Budget, Staffing, and Workload

### Organization and Responsibilities of FHWA's Office of Civil Rights

The Office of Civil Rights (FHWA/OCR) at the FHWA has primary enforcement responsibility for Title VI.[323] In addition to Title VI, FHWA/OCR has responsibility for enforcing other civil rights statutes pertaining to federally assisted and federally conducted programs, as well as for the FHWA's internal (equal employment opportunity and affirmative action) civil rights activities. The FHWA/OCR also manages the Administration's disadvantaged business enterprise program.[324]

FHWA/OCR is headed by a Director, who reports formally to the Executive Director of the FHWA, but in practice reports both to the Executive Director and to the FHWA Administrator.[325] A 1991 reorganization structured FHWA/OCR along functional lines[326] into two divisions, a Policy and Program Development Division and a Program Operations Division.[327] The Policy and Program Development Division develops and issues FHWA's civil rights policies and procedures in all areas, including Title VI and equal employment opportunity matters. It is responsible for drafting and/or coordinating policy matters, including review of proposed legislation and regulations for the Director, who is the key civil rights policy advisor for FHWA. It interacts with the Office of the Secretary's OCR and other civil rights offices.[328] The Program Operations Division has operational responsibilities for both Title VI and equal employment opportunity matters. It processes all civil rights complaints received by FHWA, conducts program reviews of the civil rights operations of FHWA's regional and field offices and State transportation agencies, and provides technical assistance and staff training for all FHWA and State civil rights personnel.[329]

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[317] Ibid., p. 452.

[318] Ibid.

[319] Ibid., p. 453.

[320] Ibid.

[321] Ibid.

[322] Ibid.

[323] *See* U.S. Department of Transportation Federal Highway Administration, "Fiscal Year 1994 Civil Rights Implementation Plan," p. 3 (hereafter cited as DOT/FHWA FY 1994 Implementation Plan).

[324] Ibid., pp. 1–2. In addition to Title VI, other civil rights statutes pertaining to federally assisted programs that FHWA/OCR is responsible for enforcing are: Title I, section 162(a) of the Highways Act, 23 U.S.C. § 324 (1988); section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988 & Supp. V 1993); the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments Act of 1978, Pub. L. No. 95–602, 92 Stat. 2955 (codified as amended in scattered sections of U.S.C.); and the Age Discrimination Act of 1975, 42 U.S.C. §§ 6101–6107 (1988). Ibid.

[325] U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Transportation, Federal Highway Administration, Q. 20, p. 16 (hereafter cited as DOT/FHWA Survey); Edward Morris, Director, Office of Civil Rights, Federal Highway Administration, U.S. Department of Transportation, interview in Washington, D.C., Feb. 7, 1995, p. 1 (hereafter cited as Morris February 1995 interview).

A major feature of the 1991 reorganization is that all FHWA/OCR staff are now "generalists." Staff members may work in the entire range of all civil rights areas under FHWA/OCR's purview — external civil rights issues, disadvantaged business enterprises, historically black colleges and universities, internal and external equal employment opportunity matters, and on-the-job training—within a 1-year period. As a result, FHWA staff are likely to be inadequately experienced in any one area, with the result that Title VI enforcement may suffer. Furthermore, staff may be torn among their various responsibilities. Thus, unless FHWA/OCR clearly makes Title VI enforcement a priority, staff may slight their Title VI responsibilities so that they can accomplish tasks in other civil rights areas.

### Organization and Responsibilities of the Regional and Field Division Offices

In addition to FHWA/OCR, the FHWA's regional offices and the FHWA's field division offices also participate in Title VI enforcement.[330] The FHWA regional civil rights offices interpret Title VI laws and regulations, establish regional policies, determine the compliance status of the FHWA's division offices and State highway agencies, and provide technical assistance and training to division office and State transportation agency staff.[331] Regional office programmatic staff are responsible for supporting and cooperating with the regional civil rights offices, including providing programmatic advice, addressing Title VI issues in program reviews of recipients, cooperating with the regional civil rights office in conducting Title VI reviews, and notifying the regional civil rights office of Title VI complaints.[332]

Like the FHWA/OCR staff, regional office staff are generalists.[333] According to the Director of FHWA/OCR, "the vast majority of their time [is] spent on external programs, with the most effort focused on internal employment of State transportation agencies (STAs) and the DBE [disadvantaged business enterprise] program."[334] Generally, the regional offices are headed by a director and have one additional civil rights staff member. A few regional offices have clerical staff.[335] Regional office staff report to their regional administrators, not to FHWA/OCR.[336] However, the Director of FHWA/OCR indicated that his office has a close working relationship with the regional civil rights staff.[337]

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[326] Edward W. Morris, Jr., Director, Office of Civil Rights, Federal Highway Administration, U.S. Department of Transportation, letter to Frederick D. Isler, Acting Assistant Staff Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, Jan. 13, 1995, enclosure, p. 1 (hereafter cited as Morris January 1995 letter).

[327] DOT/FHWA FY 1994 Implementation Plan, p. 3.

[328] Ibid., Attachments, "Policy and Program Development Division."

[329] Ibid., Attachment, "Program Operations Division."

[330] Ibid., pp. 4–7.

[331] Ibid., pp. 4–5.

[332] Ibid., p. 5.

[333] Morris January 1995 letter, enclosure, pp. 1, 4.

[334] Ibid., p. 1.

Each of FHWA's field division offices has a Title VI coordinator who coordinates all of the division's Title VI activities, provides assistance to division office program personnel, and reviews State highway agency Title VI plans.[338] The division office program staff and motor carriers staff at the field division level also have general Title VI responsibilities.[339] The field division staff with civil rights responsibilities generally are program staff, such as "Engineers, Right-of-Way Specialists, Planners, and Environmental Specialists," who are assigned civil rights responsibilities as a collateral duty.[340]

The Director of FHWA/OCR maintains that his working relationship with FHWA regional and field staff is good. However, that field and regional staff are not part of and do not report to FHWA/OCR poses the danger that FHWA/OCR may not be able to ensure adequate Title VI enforcement because of limited authority over staff engaged in day-to-day Title VI enforcement activities. Furthermore, because a large portion of the FHWA staff conducting these day-to-day Title VI enforcement activities are collateral-duty personnel who are not fully trained civil rights specialists, the FHWA's Title VI enforcement may be inadequate.

### Role of the State Transportation Agencies

FHWA provides Federal financial assistance almost exclusively to State transportation agencies for construction and to other recipients of motor carrier safety funds.[341] State highway agencies receive the Federal funds based on legislated formulas.[342] They and their subrecipients and contractors award federally assisted contracts. State Title VI coordinators initiate and monitor Title VI activities and prepare required reports.[343] State highway agencies, as recipients, are responsible for ensuring that their programs and activities and those of the subrecipients and contractors do not discriminate.[344]

Each State transportation agency must have a Title VI plan, establish a civil rights unit, and name a Title VI coordinator.[345] Furthermore, the State transportation agencies must provide sufficient staffing to perform their Title VI responsibilities. The State Title VI coordinators are responsible for overseeing the States' compliance activities, in coordination with collateral-duty State transportation agency personnel.[346]

FHWA's regulations specify the States' obligations. States must provide assurances of nondiscrimination and take affirmative action to correct any deficiencies found by the FHWA within a reasonable time period.[347] Furthermore, States must establish a civil rights unit, headed by a coordinator with easy access to the head of the State highway agency and adequately staffed to carry out its duties.[348] The civil rights unit should:

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[335] Ibid., p. 4.

[336] Morris January 1995 letter, enclosure, p. 4.

[337] Ibid.

[338] Ibid., p. 6.

[339] Ibid., pp. 6–7. Motor Carriers staff working in the field do not report to the Regional Administrator. They report to the Washington, D.C. headquarters office. Morris February 1995 interview, p. 1.

[340] Morris January 1995 letter, enclosure, p. 10.

[341] FHWA also provides funds to the Transportation Research Board. Morris February 1995 interview, p. 3.

[342] DOT/FHWA Survey, Q. 25(c), p. 18.

[343] 23 C.F.R. § 200.9(b)(1) (1995).

[344] 23 C.F.R. § 200.9 (1993).

[345] Morris January 1995 letter, enclosure, p. 5.

[346] Ibid.

- develop complaint processing procedures and investigate all complaints received;
- develop procedures for the collection of statistical data from subrecipients on the race, color, and national origin of participants and beneficiaries, including citizens adversely affected by State highway projects;
- develop a program of Title VI reviews of subrecipients;
- review State program directives to ensure compatibility with Title VI;
- conduct Title VI training programs;
- prepare a yearly report on Title VI accomplishments and goals, as well as submit a Title VI implementation plan to the FHWA regional office for approval;
- disseminate Title VI information to the public;
- establish procedures for pregrant and postgrant approval reviews of recipients;
- establish procedures for resolving a recipient's deficiency status.[349]

The FHWA has cooperative agreements in all 50 States plus the District of Columbia and Puerto Rico.[350]

### Budget, Staffing, and Workload

FHWA/OCR's fiscal year 1993 budget was $356,000.[351] In addition, the FHWA regional civil rights offices had a budget of $117,393.[352] Because civil rights responsibilities are collateral duties at the field division office level, FHWA could not determine its division offices' civil rights budget.[353] Therefore, it is impossible to determine the amount of the overall budget that is dedicated to civil rights program implementation.[354]

At the Commission's request, the FHWA reported separately on its Title VI expenditures. In fiscal year 1992, its Title VI enforcement expenditures totaled $102,648, and increased to $308,000 in fiscal year 1993.[355] In fiscal year 1993, the FHWA spent $12,000 for Title VI technical assistance, $5,000 for Title VI training, a decrease from $15,000 in 1976, $37,600 for Title VI onsite compliance reviews, and $30,000 for Title VI complaint processing.[356] The FHWA's fiscal year 1993 budget outlays for Title VI enforcement are meager when compared to the FHWA's total budget for that year, which was in excess of $18 billion.[357] However, the FHWA can track its expenditures separately for Title VI enforcement, an improvement over other modal administrations. Most other modal administrations do not maintain separate budget accounts for Title VI enforcement, although they do for Title VII enforcement. FHWA's ability to track its civil rights expenditures by statute and type of activity should facilitate effective management planning at the FHWA.

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[347] 23 C.F.R. § 200.9(a) (1993).

[348] *Id.* § 200.9(b)(1),(2). The civil rights unit must include a Title VI equal employment opportunity coordinator or a Title VI specialist.

[349] *Id.* § 200.9(b)(3)–(15).

[350] DOT/FHWA Survey, Q. 30, p. 21.

[351] Ibid., Q. 33, p. 23.

[352] Ibid.

[353] Ibid.

[354] Ibid.

[355] Ibid., Q. 34, p. 24.

[356] Ibid.

[357] Ibid., Q. 33, p. 23.

FHWA/OCR has a full-time permanent ceiling of 19 FTEs, an increase of 3 since 1990.[358] The total staff ceiling is 18, which reflects an increase of 2 FTEs since 1990.[359] Currently, FHWA has 17 FTEs and 1 junior fellow. The staff includes the Director, 5 FTEs in the Policy and Program Development Division, 6 FTEs in the Program Operations Division, and several support staff.[360] The FHWA's regional civil rights staff includes 9 regional civil rights directors and 10 equal opportunity specialists and support staff.[361] All of FHWA's staff members are generalists. None focuses exclusively on Title VI.[362]

FHWA/OCR's current staffing levels reflect a decline since 1976 when the FHWA had a total civil rights staff of 76 FTEs. The number of civil rights staff declined thereafter, reaching a low of 35 FTEs in 1992. Between 1992 and 1993, the civil rights staff increased by 4.5 FTEs, to 39.5 FTEs.[363] Of these, only 5.5 FTEs were devoted to Title VI enforcement, less than one-half the number (12) in 1976. This number has remained constant since 1988.[364]

According to the FHWA's survey response, the recent passage of civil rights legislation, such as the Civil Rights Act of 1991,[365] the Civil Rights Restoration Act of 1987,[366] the Americans with Disabilities Act of 1990,[367] the Civil Rights Remedies Equalization Act of 1986,[368] the Age Discrimination in Employment Act,[369] and the Family and Medical Leave Act[370] are "starting to increase workload far and beyond our capacity to address the new and expanding issues."[371] For example, since April 1994, FHWA/OCR has received 161 complaints relating to the Americans with Disabilities Act alone.[372]

Furthermore, the FHWA does not have sufficient resources devoted to Title VI enforcement to fulfill its Title VI enforcement responsibilities.[373] It indicated that:

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[358] Edward W. Morris, Jr., Director, Office of Civil Rights, Federal Highway Administration, U.S. Department of Transportation, letter to Frederick D. Isler, Acting Assistant Staff Director for Civil Rights Evaluation, U.S. Commission on Civil Rights, Apr. 25, 1995, enclosure, p. 1 (hereafter cited as Morris April 1995 letter, enclosure).

[359] Ibid.

[360] Morris January 1995 letter, enclosure, p. 1.

[361] DOT/FHWA FY 1994 Implementation Plan, p. 8.

[362] DOT/FHWA Survey, Q. 23, p. 17.

[363] DOT/FHWA Survey, Q. 35(c), p. 25.

[364] Ibid., Q. 36(c), p. 26.

[365] Pub. L. No. 102–166, 105 Stat. 1071 (codified in scattered sections of 29 U.S.C., 42 U.S.C.).

[366] Pub. L. No. 100–259, 102 Stat. 28 (codified as amended in scattered sections of U.S.C.).

[367] 42 U.S.C. §§ 12,101–12,213 (Supp. V 1993).

[368] Pub. L. No. 99–506.

[369] 42 U.S.C. §§ 6101–6107 (1988).

[370] Pub. L. No. 103–3, 107 Stat. 6 (codified as amended in scattered sections of U.S.C.).

[371] DOT/FHWA Survey, Q. 27, p. 20.

[372] George Duffy, Office of Civil Rights, Federal Highway Administration, U.S. Department of Transportation, faxed information to Nadja Zalokar, Supervisory Civil Rights Analyst, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, Feb. 8, 1995.

> [t]he passage of a series of statutes requiring States to include goals for Disadvantaged Business Enterprise (DBE) participation in federally assisted highway construction and related work resulted in commitments of limited resources to meet mandated and expressed needs. The recent passage of a series of civil rights statutes which expand the scope and reach of Title VI is expected to tax our resources further. [374]

### DOT Reorganization

Under DOT's original proposed reorganization, the Office of the Secretary's OCR would have taken over FHWA's current responsibilities for internal and external complaint investigation as well as its compliance review activities. According to FHWA/OCR's Director:

> The general effect of the original consolidation proposal would have been extremely detrimental to FHWA's Civil Rights Programs, leaving only 19 [percent] of the full-time civil rights staff to perform . . . functions which currently occupy 65–70 [percent] of the FTE staff hours. Proactive initiatives in such areas as "Women in Highway Construction," Indian Preference, and particularly our initiative promoting a proactive approach to Title VI and related nondiscrimination statutes . . . would have suffered heavily from lack of staffing and funding to carry them out.[375]

The reorganization would have reassigned 15 of 18 FHWA/OCR staff members and all but 5 regional civil rights staff members to the Office of the Secretary's OCR.[376]

However, since Congress did not approve the proposed reorganization in full, the effect on FHWA/OCR will be "far less than previously anticipated."[377] FHWA/OCR anticipates that consolidation will affect formal internal civil rights complaints processing only. FHWA/OCR will retain its external civil rights enforcement responsibilities, and it will lose far fewer staff.[378] The Director of FHWA/OCR said that the office has lost three positions to the Office of the Secretary's OCR, but that he anticipates that FHWA will provide his office with additional positions to compensate for the loss.[379]

Since Congress has delayed full reorganization, the FHWA Administrator is convening a task force to "identify problems and recommend actions to improve the operation of our civil rights program."[380] In addition, the Administrator requested FHWA's Office of Program Review to conduct a detailed review of selected program areas "to provide a more thorough, objective, and comprehensive plan for improving certain aspects" of the FHWA's civil rights enforcement program.[381]

## Regulations, Guidelines, Policies, and Procedures

Relative to other DOT modal administrations, the FHWA has an unusually comprehensive set of regulations, guidelines, policies, and procedures, which lay a sound foundation for FHWA's Title VI enforcement program.

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[373] Ibid., Q. 82(b), p. 53.

[374] Ibid., Q. 83, p. 54.

[375] Morris January 1995 letter, enclosure, p. 7.

[376] Edward W. Morris, Jr., Director, Office of Civil Rights, Federal Highway Administration, U. S. Department of Transportation, interview in Washington, D.C., Sept. 16, 1994, p. 1.

[377] Morris January 1995 letter, p. 1.

[378] Ibid.

[379] Morris February 1995 interview, p. 1.

[380] Morris January 1995 letter, p. 1.

[381] Ibid.

### Regulations

The FHWA has its own Title VI regulations.[382] The regulations are specific to Title VI, provide guidelines for implementing the FHWA's Title VI compliance program, and provide guidelines for conducting Title VI program compliance reviews.[383] They also specify the responsibility of the State highway agencies.[384]

The regulations do not contain an appendix listing the FHWA's Federal financial assistance programs. Furthermore, the regulations do not address the discrimination prohibited. The FHWA indicated that it relies on DOT's Title VI regulations for these matters.[385]

In addition to FHWA's Title VI regulations, in 1993 FHWA issued Order 4720.1A entitled "Civil Rights Responsibilities of Motor Carrier Safety Assistance Programs (MCSAP)."[386] FHWA Order 4720.1A spells out the roles and responsibilities of FHWA/OCR, FHWA's regional and field division offices, and recipients of the Motor Carrier Safety Assistance Program in the area of civil rights.[387] The order covers their responsibilities with respect to Title VI as well as other civil rights statutes and regulations.[388]

### Guidelines and Procedures

The FHWA regions issue their own Title VI guidelines. An example is the *Title VI Implementation Guide* issued by Region 6 in 1982 and updated in 1983 and 1989.[389] The guide is designed to:

> 1) Define Title VI issues that are most likely to arise in the Federal-aid highway program;
>
> 2) Define the Title VI implementation roles and responsibilities of the FHWA regional office of civil rights and program offices, the FHWA division office Title VI coordinators and program managers, and the FHWA Title VI specialists/designees and program area personnel;
>
> 3) Outline required elements of State Title VI plans; and
>
> 4) Provide guidance on minimum documentation necessary to substantiate Title VI implementation activities.[390]

FHWA/OCR has distributed a "Title VI Implementation Guide" to all regional civil rights directors.[391] In addition, FHWA/OCR is preparing a Title VI handbook and instructional manual as part of a "preventing discrimination initiative."[392] According to the Director of FHWA/OCR, the handbook and manual are based on a tested curriculum designed to teach program personnel about Title VI. The manual provides examples of Title VI violations, including situations in which the same treatment is not equal treatment.

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[382] 23 C.F.R. Part 200 (1993).

[383] *Id.* § 200.1.

[384] *Id.* § 200.9.

[385] DOT/FHWA Survey, Q. 8, p. 8.

[386] U.S. Department of Transportation, Federal Highway Administration, Order 4720.1A, "Civil Rights Responsibilities of Motor Carrier Safety Assistance Program (MCSAP)," July 16, 1993.

[387] *Id.* at 3–9.

[388] *Id.* at 1.

[389] U.S. Department of Transportation, Federal Highway Administration, Region 6, *Title VI Implementation Guide*, prepared by the Regional Office of Civil Rights, Sept. 30, 1992.

[390] Ibid., p. 2.

[391] DOT/FHWA FY 1994 Implementation Plan, p. 15.

[392] Morris January 1995 letter, enclosure, p. 10.

FHWA recognizes that the enactment of the Intermodal Surface Transportation Efficiency Act of 1991,[393] as well as new civil rights legislation, such as the Americans with Disabilities Act, and the issuance of FHWA Order 4720.1A on the "Civil Rights Responsibilities of the Motor Carrier Safety Assistance Program" require "analysis and coordination of new, comprehensive guidelines to assist recipients and FHWA field staffs."[394] Development of such guidelines and revision of the FHWA regulations were priority items in FHWA/OCR's strategic plan.[395]

### Policies

In recent years, the FHWA has issued several policy statements related to Title VI. In September 1992, the FHWA issued a notice discussing the impact of the Civil Rights Restoration Act of 1987 on its civil rights enforcement program.[396] The following year, FHWA issued a pamphlet addressing the civil rights implications of the Intermodal Surface Transportation Efficiency Act of 1991.[397] Also, the Administrator of the FHWA issued a "Civil Rights Policy Statement" expressing his commitment to the agency's external civil rights enforcement program.[398]

## Process of Title VI Enforcement

The FHWA provides most of its federally assisted funds to State highway administrations based on a legislated formula. The State highway administrations have the contracting authority to distribute the funds for programs.[399] Because the FHWA does not play a direct role in allocating funds for programs, it generally monitors its recipients through its postaward review, rather than a preaward review, process.[400]

### Preaward Reviews

Each State and territory must sign an assurance of nondiscrimination and compliance with Title VI.[401] As noted above, the FHWA does not conduct preaward reviews of recipients "because of the nature of [its] programs and formula based apportionment."[402] More specifically, the FHWA argues that the preaward process is "meaningless" since most of its funds are appropriated through formula grants.[403] The FHWA explained:

> The Federal Highway Administration, in administering the Highway Trust Fund, reimburses States for the pro rata share of approved projects authorized for construction. The recipient States, the District of Columbia, and Puerto Rico are apportioned funds by formula. Representatives of each recipient highway agency have

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[393] Pub. L. 102–240, 105 Stat. 1914 (codified as amended in scattered sections of U.S.C.).

[394] DOT/FHWA FY 1994 Implementation Plan, p. 11.

[395] Morris February 1995 interview, p. 2.

[396] U.S. Department of Transportation, Federal Highway Administration, Notice 4720.6, "Impacts of the Civil Rights Restoration Act of 1987 on FHWA Programs," Sept. 2, 1992.

[397] U.S. Department of Transportation, Federal Highway Administration, "Civil Rights Implications of the Intermodal Surface Transportation Efficiency Act of 1991," revised August 1993.

[398] Rodney E. Slater, Federal Highway Administrator, Federal Highway Administration, U.S. Department of Transportation, "Civil Rights Policy Statement" (no date).

[399] DOT/FHWA Survey, Q. 41, p. 31.

[400] Morris January 1995 letter, enclosure, p. 12.

[401] DOT/FHWA Survey, Q. 42, p. 32.

[402] Ibid., Q. 41, p. 31.

[403] *See* Morris January 1995 letter, enclosure, p. 12.

> signed assurances stating that work will be done consistent with Title VI of the Civil Rights Act and related statutes. Through legislated contract authority, States are made aware of available funds as soon as an authorization act is enacted.[404]

However, the Director of FHWA/OCR indicated that FHWA can and sometimes does delay funds for State projects when it has found noncompliance in a postaward review. He added that enactment of the Intermodal Surface Transportation Act made it more difficult to delay funds because the FHWA now distributes its funding through quarterly apportionments, instead of its previous practice of a project-by-project basis.[405]

### Postaward Desk-Audit and Onsite Compliance Reviews

The FHWA does not conduct postaward desk-audit reviews except as part of its onsite compliance reviews. Regional civil rights staff members analyze accomplishment reports and updates of State highway agency approved plans. Prior to and as part of the reviews, they assess the program plans. They do not conduct a separate desk audit as the sole basis for a compliance determination.[406]

The FHWA regional civil rights staff members conduct onsite compliance reviews of State transportation agencies through the Office of the Secretary's OCR and FHWA/OCR.[407] According to the FHWA, "Compliance reviews are of the States' implementation of their approved nondiscrimination program plans. Some of the planning, design, and right-of-way work may extend over several years on major projects as they are developed. The reviews present snapshots of particular aspects of extended processes and are aimed toward ensuring that those affected are treated fairly."[408]

In fiscal year 1992, the FHWA completed 113 onsite compliance reviews, of which 89 resulted in findings of compliance and 24 in findings of noncompliance.[409] The following year, the FHWA completed far fewer reviews, 47, of which only 1 resulted in a finding of noncompliance.[410] The Director of FHWA/OCR explained that his office's objective is to ensure that States are in compliance.[411] When FHWA/OCR determines that States are in noncompliance, FHWA staff provide technical assistance and training for State personnel and explain the States' responsibilities. He indicated that after this intervention, States usually come into compliance voluntarily.[412]

Although the FHWA listed compliance reviews as a priority, it also indicated that "the majority of time has been spent promoting and managing the [disadvantaged business enterprise] program."[413] The Director of FHWA/OCR said that with two civil rights staff in most regions, and an increasing complaint load, FHWA/OCR does not have the resources to conduct a large number of onsite compliance reviews.[414]

### Complaint Investigations

The Office of the Secretary's OCR reserves complaint acceptance and investigation authority to itself.[415] The FHWA is responsible for transmitting complaints to the Office of the Secretary's OCR, and the Office of the Secretary's OCR may refer selected complaints back to FHWA for investigation.[416] The FHWA sends complaints that are received in the field directly to the Office of the Secretary for processing, unless they are individual complaints of employment discrimination, which it sends to the Equal Employment Opportunity Commission.[417]

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[404] DOT/FHWA FY 1994 Implementation Plan, p. 12. *See also* Morris January 1995 letter, enclosure, p. 12.

[405] Morris February 1995 interview, p. 2.

[406] DOT/FHWA Survey, Q. 63, p. 39.

[407] Ibid., Q. 25, pp. 18–19.

[408] Ibid., Q. 41, p. 31.

[409] Ibid., Q. 68, p. 43.

[410] Ibid.

[411] Morris February 1995 interview, p. 3.

[412] Ibid.

[413] Ibid., Q. 39, p. 29. *See also* Morris January 1995 letter, enclosure, pp. 13–14.

[414] Morris February 1995 interview, p. 2.

In fiscal year 1992, the FHWA received 15 civil rights complaints, of which 5 were Title VI complaints.[418] Two of the five Title VI complaints were based on national origin, and three were based on race.[419] In fiscal year 1993, the FHWA received 16 complaints, of which 5 were Title VI complaints.[420] Four of the five Title VI complaints were based on race, and one was based on national origin.[421]

### Deficiencies, Remedies, and Sanctions

The FHWA has found a number of deficiencies in State transportation agencies' Title VI compliance programs, including, but not limited to, inadequate training and staff, a lack of monitoring, insufficient organizational structure, and procedural and monitoring weaknesses.[422] However, FHWA has not frequently pursued administrative options. Although the Director of FHWA/OCR said that pursuing such options would enhance the credibility of the agency, he does not have enough staff to do so frequently.[423] The FHWA revealed that, in 1984, Title VI administrative proceedings resulted in one deferral and one suspension of Federal financial assistance to two recipients found in noncompliance.[424] In 1988 there was just one sanction—a deferral of funds.[425] The FHWA imposed no sanctions in 1992, and terminated assistance to one recipient in 1993.[426]

### Outreach and Education

Relative to the other DOT modal administrations, the FHWA has an active outreach and education program. The FHWA disseminates information through the *Federal Government Manual*; presentations at national, regional, and State conferences; training courses; and through information pamphlets.[427] Each field office must provide Title VI information upon request.[428] Each State must publicize the names and other pertinent information regarding their Title VI coordinators.[429] Civil rights staff participate as speakers and panelists at conferences sponsored by contractors' associations, minority and women's organizations, and other groups.[430] The FHWA provided the Commission with a sample list of more than 30 organizations contacted during the course of FHWA's education and outreach activities.[431]

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[415] DOT/FHWA FY 1994 Implementation Plan, p. 11.

[416] Ibid.

[417] Ibid. FHWA processes class action and pattern or practice employment discrimination complaints. Morris February 1995 interview, p. 2.

[418] DOT/FHWA Survey, Q. 71, p. 45. The remaining nine complaints were based on Title VII.

[419] Ibid., Q. 72, p. 46.

[420] Ibid., Q. 71, p. 45. The remaining 12 complaints were based on Title VII.

[421] Ibid., Q. 72, p. 46.

[422] Ibid., Q. 67, p. 42.

[423] Morris February 1995 interview, p. 3.

[424] DOT/FHWA Survey, Q. 80, p. 51.

[425] Ibid.

[426] Ibid. There is also one termination action pending for 1993. In addition, there is one case currently in litigation.

[427] Ibid., Q. 48, p. 35.

[428] Ibid.

[429] 23 C.F.R. § 200.9(b)(12) (1993).

### Technical Assistance

According to the Director of FHWA/OCR, all recipients "receive a high level of technical assistance. . . ."[432] Regional civil rights personnel and the field division offices' collateral duty civil rights staff provide technical assistance on site.[433] FHWA/OCR sometimes provides technical assistance on unusually complex or sensitive matters.[434] In 1993, FHWA/OCR conducted a series of preventive approach technical assistance sessions with States.[435] In 1993, FHWA/OCR conducted a series of four technical assistance programs, each lasting 2–3 days, for three States, one of which previously had been found in noncompliance. The technical assistance involved briefing FHWA field staff members and State executives before presenting an overview and training on preventing discrimination to State program practitioners and civil right staff members. The effort served as the basis for an ongoing formal training effort being developed in line with a major element in the FHWA national strategic plan. The training will be offered to States upon request and where reviews or investigations indicate the need. In anticipation of the course, 18 States have already requested to receive it.[436] In addition, FHWA provides technical assistance through telephone contacts, conference calls, onsite visits,[437] and upon request from States.

Thus, the FHWA is actively engaged in providing technical assistance to its recipients. However, FHWA did not indicate what types of technical assistance it offers, the frequency of that assistance, or the result or impact of the assistance. This lack of reporting may be because FHWA does not have a formal national technical assistance tracking system for the Title VI nondiscrimination program. FHWA relies on reviews of regional operations to provide information on monitoring, reviews, and technical assistance activities.[438]

## Monitoring State Title VI Enforcement

The FHWA field division collateral-duty personnel monitor the State transportation agencies' activities, and regional office civil rights staff review the State transportation agencies' Title VI plans and civil rights programs annually.[439]

The FHWA has found that many States are not adequately fulfilling their Title VI and other civil rights enforcement responsibilities:

> [i]n some cases, the lack of oversight by responsible agencies has resulted in a situation where agency managers have managed risk, rather than address issues which demand more attention. If it's true that what gets measured gets done, the lack of oversight to date

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[430] Morris January 1995 letter, enclosure, p. 16.

[431] Ibid., pp. 16–17.

[432] Ibid., p. 15.

[433] Ibid.

[434] DOT/FHWA FY 1994 Implementation Plan, p. 12.

[435] Ibid., p. 15.

[436] Morris January 1995 letter, enclosure, p. 16; Morris April 1995 letter, enclosure, p. 2. *See also* DOT/FHWA FY 1994 Implementation Plan, p. 17.

[437] Morris January 1995 letter, enclosure, p. 16.

[438] DOT/FHWA FY 1994 Implementation Plan, p. 16.

[439] Morris January 1995 letter, enclosure, p. 6.

ought to result in no surprise in many agencies that nothing much has been done.[440]

According to the Director of FHWA/OCR, "[w]hen reviews identify significant deficiencies related to staffing or inattention to Title VI requirements, the FHWA [obtains] correction of the problems.[441]

Areas of emphasis for future enforcement and implementation include improved monitoring of State and local Title VI programs, as well as more empowered and better trained State staffs.[442]

## Staff Training

FHWA/OCR offers training for FHWA's immediate civil rights staff, as well as program managers, contract officers, and project officers.[443] New civil rights staff at the FHWA receive training in civil rights compliance, though it is usually given on the job.[444]

Before the 1991 reorganization of FHWA/OCR along functional lines, FHWA/OCR staff received training in all of the civil rights areas addressed by FHWA/OCR, including on-the-job training with 2–4-month rotations in each of the civil rights program areas. In addition, all staff received 2–4 hours of training in a number of program areas, including "Title VI/nondiscrimination" and "Title VI complaints."[445] The training covered relevant statutes, Executive orders, regulations, and directives, program administration, and the roles and responsibilities of various enforcement components.[446]

FHWA staff participate in training programs targeted at State transportation agency personnel.[447] The FHWA conducts seminars at meetings of its regional civil rights directors and their staffs at biannual national conferences.[448] According to the Director of FHWA/OCR, the 1992 and 1994 conferences "each featured training, discussion groups, or workshops, many of which were related to Title VI and nondiscrimination concerns."[449] The 1994 conference focused on environmental justice issues, and the 1992 conference offered training on the Americans with Disabilities Act and contract compliance and investigation.[450] In addition, FHWA relies on contractors to provide training in investigating complaints.[451]

## Reporting Requirements, Data Collection, and Analysis

The State transportation agencies must develop procedures for the collection of statistical data of participants in, and beneficiaries of State highway programs, such as relocatees, impacted citizens, and affected communities.[452] The FHWA receives annual reports from State transportation agencies outlining how Federal monies were spent and which entities received contracts through Federal funds.[453] In addition, the agencies submit to FHWA semi-annual reports of disadvantaged business enterprise awards.[454] Those semi-annual reports provide the number and types of businesses or individuals receiving federally assisted contracts.[455] Since minorities affected by a proposed major project may participate in that project's development, recipients also may collect data on these minorities.[456] Finally, recipients submit annual accomplishment reports and program updates to regional civil rights directors outlining the results of their efforts and any changes in their programs.[457]

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[440] DOT/FHWA Survey, Q. 83, p. 55.

[441] Morris January 1995 letter, enclosure, p. 6.

[442] DOT/FHWA Survey, Q. 82(e), p. 53.

[443] Ibid., Qs. 25(1),(2), pp. 18–19.

[444] Ibid., Q. 49, p. 35.

[445] Morris January 1995 letter, enclosure, p. 19.

[446] Ibid.

[447] DOT/FHWA FY 1994 Implementation Plan, p. 18.

[448] DOT/FHWA Survey, Q. 50, p. 36.

[449] Morris January 1995 letter, enclosure, p. 19.

[450] Ibid.

[451] Ibid.

[452] 23 C.F.R. § 200.9(b)(4) (1993).

## Civil Rights Implementation Plans

The Commission reviewed FHWA's Civil Rights Implementation Plans for fiscal years 1993[458] and 1994.[459] FHWA submitted the 1993 plan to DOT for transmittal to the Department of Justice.[460] However, DOT did not send the plan to the Department of Justice.[461]

The FHWA's Civil Rights Implementation Plans provide general information on the agency's Title VI enforcement program, but do not go into sufficient detail to permit either the Department of Justice or the general public to gain a true understanding of the FHWA's enforcement process.[462] In particular, the plans do not adequately describe the responsibility of the State transportation agencies. Furthermore, the plans do not discuss postaward reviews, routine monitoring, or legal and administrative enforcement.[463]

The FHWA's Civil Rights Implementation Plans do not indicate that the FHWA used them as agency planning documents, as required by the Department of Justice.[464] In particular, the sections of the plans describing the agency's goals and objectives are inadequate. They do not provide a blueprint for agency action over the 4-year period covered by the plan. They do not cover all, or even most, of the Title VI implementation process, as required by the Department of Justice.

The 1993 and the 1994 plans contain the same long-range goals and major objectives. The long-range goals are:

> To take proactive measures to prevent the occurrence of discrimination in highway project development and program management and to provide training modules to promote a preventive approach to ensuring nondiscrimination in all of the programs and activities of federal-aid recipients, sub-recipients and contractors.[465]

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[453] DOT/FHWA Survey, Q. 59, p. 38.

[454] Ibid.

[455] Ibid., Q. 61, p. 39.

[456] Ibid.

[457] Ibid., Q. 62, p. 39.

[458] U.S. Department of Transportation, Federal Highway Administration, "Fiscal Year 1993 Civil Rights Implementation Plan" (hereafter cited as DOT/FHWA FY 1993 Implementation Plan).

[459] DOT/FHWA FY 1994 Implementation Plan.

[460] DOT/FHWA Survey, Q. 14, p. 13; Morris February 1995 interview, p. 3.

[461] Ibid.

[462] *See* DOT/FHWA FY 1994 Implementation Plan, pp. 1–13. The Department of Justice specifies that the Civil Rights Implementation Plans should provide sufficient information to assist the Department's oversight of Federal agencies and to serve as a source document for public information on the agency's civil rights enforcement program. DOJ Guideline for Agency Implementation Plans, pp. 2, 3.

[463] DOT/FHWA FY 1994 Implementation Plan, p. 12.

[464] DOJ Guideline for Agency Implementation Plans, p. 2.

[465] DOT/FHWA FY 1993 Implementation Plan, p. 17; DOT/FHWA FY 1994 Implementation Plan, p. 16.

The major objectives are:

> To increase the effectiveness of monitoring efforts, to ensure that discrimination is identified and adequately addressed in the project development process and highway program management, and to identify training needs of State civil rights staff.[466]

The short-term objectives are more specific, but they are very limited.[467] For fiscal year 1994, the short-term objectives are:

- Present a pilot course on Title VI program;
- Present training for State and MCSAP recipients;
- Initiate a task force review of nondiscrimination in program areas;
- Provide policy guidance on Title II of the Americans with Disabilities Act.[468]

The Civil Rights Implementation Plans discuss the FHWA Title VI implementation cycle, which includes four phases.[469] Phase I "involves upgrading the Title VI planning process"[470] to address problems identified in FHWA analyses of State Title VI plans. The most common problems identified were confusion regarding discrimination prohibited by Title VI and related statutes and not incorporating other applicable nondiscrimination statutes within the framework provided by the Title VI process.[471] Further, the analyses showed that many Title VI plans duplicated other State procedures, such as planning, design, administration and project development.[472]

Phase II includes the implementation of training and briefing modules as a preventive approach to ensure nondiscrimination in all of the programs and activities in all of the federally assisted programs.[473] The phase involves training FHWA and State staff officials to enhance their awareness and capability to identify those programs and activities that may be discriminatory.[474] The supporting objectives include clarification of roles, relationships, and responsibilities of State and civil rights staffs in project assessment and development of project activities through a systematic interdisciplinary approach.[475]

Phase III focuses on the ongoing monitoring of State nondiscrimination program efforts.[476] It requires that responsible program managers become aware of how their decisions and their actions or inactions may cause discrimination.[477] Under Phase IV, FHWA analyzes and coordinates new guidelines for various civil rights statutes to assist recipients and FHWA field staff.[478]

Although these four phases of activities indicate FHWA's plan to focus on Title VI initiatives, the plans do not indicate when the FHWA will initiate the phases, in what order it will implement them, or when it will complete them.

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[466] DOT/FHWA FY 1993 Implementation Plan, p. 17; DOT/FHWA FY 1994 Implementation Plan, p. 16.

[467] DOT/FHWA FY 1993 Implementation Plan, p. 19; DOT/FHWA FY 1994 Implementation Plan, p. 18.

[468] DOT/FHWA FY 1994 Implementation Plan, p. 18.

[469] DOT/FHWA FY 1993 Implementation Plan, pp. 9–11; DOT/FHWA FY 1994 Implementation Plan, pp. 9–11.

[470] *See* DOT/FHWA FY 1994 Implementation Plan, p. 9.

[471] *See* ibid., pp. 9–10.

[472] *See* ibid.

[473] *See* ibid.

[474] *See* ibid.

[475] *See* ibid.

[476] *See* ibid., p. 11.

[477] *See* ibid.

[478] *See* ibid.

## Findings and Recommendations

### Organization, Budget, Staffing, and Workload

#### Organization

**Finding:** The organizational structure of civil rights enforcement at the Federal Highway Administration (FHWA) has several deficiencies. FHWA's Office of Civil Rights (FHWA/OCR) does not have a separate unit devoted to external civil rights enforcement, and all FHWA/OCR staff are generalists. Furthermore, the FHWA regional office and field division staff, who perform much of FHWA's day-to-day Title VI enforcement, do not report to the Director of FHWA/OCR.[479]

**Recommendation:** FHWA should restructure its civil rights enforcement staff. Within FHWA/OCR, separate units, with policy and operational components, should be created for external civil rights, internal civil rights, and the disadvantaged business enterprise and historically black colleges program. Regional and field division civil rights staff should report to the Director of FHWA/OCR and, staff resources permitting, specialize in either internal or external civil rights functions.

#### Budget, Staffing, and Workload

**Finding:** FHWA/OCR has the capability of tracking its expenditures separately for Title VI and other civil rights statutes, as well as for specific enforcement activities, such as technical assistance, training, and complaint processing. However, this capability does not extend to the activities of FHWA's regional and field division staff.[480]

**Recommendation:** FHWA should extend its civil rights information management system to include information on civil rights expenditures of regional and field division offices comparable in detail to the information it has on FHWA/OCR's activities. FHWA should use this information management system to prepare an annual Title VI enforcement plan, with goals and objectives, assigning specific resources to specific civil rights activities. Furthermore, FHWA/OCR should use its information management system to compare its resources with its workload in the various civil rights areas for which it has responsibility and to demonstrate the need for additional resources for it to carry out its civil rights enforcement mandate effectively.

**Finding:** Increasing workloads in other civil rights areas, such as the Americans with Disabilities Act and the disadvantaged business enterprise program, have reduced staff resources available for Title VI compliance and enforcement and impeded FHWA's ability to enforce Title VI effectively.[481]

**Recommendation:** FHWA should undertake steps, such as creating a separate external civil rights enforcement unit, to insulate Title VI enforcement resources from the needs of other civil rights programs and activities. Furthermore, FHWA should use its information management system to demonstrate the need for additional resources for its civil rights program.

### Regulations, Guidelines, Policies, and Procedures

**Finding:** FHWA has an unusually comprehensive set of regulations, guidelines, policies, and procedures that form a sound basis for its Title VI compliance and enforcement program. They clearly delineate the relative responsibilities of different FHWA components and State recipients and give examples of noncompliance with Title VI that are specific to FHWA programs. Furthermore, FHWA provides policy statements on new issues, such as the Civil Rights Restoration Act and the Intermodal Surface Transportation Act, as they arise.[482]

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[479] *See* pp. 540–44.

[480] *See* pp. 544–46.

[481] *See* pp. 545–46.

[482] *See* pp. 546–48.

**Recommendation:** Other DOT modal administrations should use FHWA's regulations, guidelines, polices, and procedures as a model in developing their own Title VI implementation documents.

## Process of Title VI Enforcement

### Compliance Reviews

**Finding:** A central component of FHWA's Title VI compliance and enforcement process is the performance of onsite reviews of State recipients. However, limited staff resources in FHWA's regional offices have prevented FHWA from conducting as many compliance reviews as it used to.[483]

**Recommendation:** FHWA should commit additional resources to the FHWA regional offices for the purpose of accomplishing a larger number of onsite compliance reviews.

### Deficiencies, Remedies, and Sanctions

**Finding:** FHWA is unusual among Federal agencies in that it uses administrative sanctions, such as fund deferral and fund suspension, as a means of compelling compliance with Title VI. Although the Director of FHWA/OCR indicated that use of the administrative process would enhance the credibility of FHWA in its Title VI compliance and enforcement efforts, two factors have prevented frequent use of administrative options to compel compliance with Title VI—FHWA's limited staff resources and the transformation of Federal assistance programs into block grant programs. For example, the change, under the Intermodal Surface Transportation Act, from project-based funding to quarterly funding based on legislated formulas, has made the use of fund deferral sanctions more difficult.[484]

**Recommendation:** FHWA should request additional resources to enhance its use of administrative sanctions, when necessary, in Title VI enforcement. FHWA also should strive to develop ways of using administrative sanctions in block grant programs to compel compliance with Title VI. In addition, FHWA should ensure that Congress and the U.S. Department of Justice are informed of the complexities of civil rights enforcement in block grant programs. In particular, FHWA should present to Congress and the Department of Justice details on the problems it has faced in enforcing programs funded under the Intermodal Surface Transportation Act. Through such communications, FHWA can provide Congress with a greater awareness of civil rights enforcement issues in Federal financial assistance programs, and, thus, it can promote considerations of civil rights enforcement as a factor in the creation and development of federally funded programs.

### Outreach and Education

**Finding:** FHWA has an active outreach and education program. FHWA imposes outreach and education requirements on State recipients, but also itself is involved heavily in providing outreach and education.[485]

**Recommendation:** Other DOT modal administrations should use FHWA's outreach and education program as a model when formulating their own strategic outreach and education plans.

### Technical Assistance

**Finding:** FHWA has an active technical assistance and training program for State recipients. However, FHWA does not have in place an information management system that permits it to track its provision of technical assistance.[486]

**Recommendation:** Other DOT modal administrations should use FHWA's technical assistance program as a model when developing their own programs. However, FHWA should strive to improve the operation of its program by using an information management system to track and plan technical assistance activities.

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[483] *See* p. 549.

[484] *See* p. 550.

[485] *See* pp. 550–51.

[486] *See* p. 551.

### Monitoring State Title VI Enforcement

**Finding:** FHWA has in place a model system for monitoring State Title VI enforcement activities. Its regulations clearly specify the States' obligations and require the States to develop annual Title VI plans and progress reports for FHWA review. To ensure that the State recipients are in compliance with Title VI, FHWA supplements these reviews with onsite compliance reviews and the provision of technical assistance and training to State recipients.[487]

**Recommendation:** Other DOT modal administrations and other Federal agencies with continuing State programs should use FHWA's State monitoring program as a model in developing their own plans.

### Staff Training

**Finding:** FHWA provides comprehensive civil rights training to its civil rights and program staff and to State recipient staff.[488]

**Recommendation:** Other DOT modal administrations should use FHWA's staff training program as a model when developing their own civil rights training.

### Civil Rights Implementation Plans

**Finding:** FHWA's Civil Rights Implementation Plans do not fulfill the purposes envisioned by the U.S. Department of Justice in its "Guideline for Agency Implementation Plans Required by Executive Order 12,250, 'Leadership and Coordination on Nondiscrimination Laws.'" They do not provide sufficient information for the Department of Justice or the public to gain an understanding of FHWA's civil rights enforcement program. The do not have goals and objectives for all parts of the Title VI implementation process. Finally, FHWA/OCR is not using the plans as a management tool.[489]

**Recommendation:** FHWA should develop its Civil Rights Implementation Plans in conformance with the Department of Justice guideline. In particular, FHWA should describe more fully the structure of its civil-rights enforcement, including the role of the State transportation agencies. Furthermore, FHWA should develop goals and objectives for each of the parts of the Title VI implementation process. Finally, FHWA should use the plans as a management tool.

## Federal Railroad Administration

The Federal Railroad Administration (FRA) is responsible for overseeing the Nation's railways. It promulgates rail safety regulations, provides financial assistance for railroads, supports railroad-related research, and sets national railroad policy.[490]

### Federally Assisted Programs

In 1993, FRA awarded nearly $125 million to 46 recipients in its federally assisted programs,[491] which include:

> The *grants-in-aid for railroad safety—State participation program* promotes safety in all areas of railroad operations and reduces railroad-related accidents and casualties. It also reduces damage to property caused by accidents involving any carrier of hazardous materials by providing State participation in the enforcement and promotion of safety practices.[492] Assistance for this program is in the

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[487] *See* pp. 551–52.

[488] *See* p. 552.

[489] *See* pp. 553–54.

[490] Office of the Federal Register, National Archives and Records Administration, *The United States Government Manual, 1994/95* (Superintendent of Documents: Washington, D.C., 1994), p. 468.

[491] U.S. Department of Transportation, Federal Railroad Administration, "Fiscal Year 1994 Civil Rights Implementation Plan," Workload and Performance Data, p. 11 (hereafter cited as DOT/FRA FY 1994 Implementation Plan).

[492] Office of Management and Budget and U.S. General Services Administration, *1993 Catalog of Federal Domestic Assistance* (Superintendent of Documents: Washington, D.C., 1993), vol. 1, p. 455.

form of project grants and is available to the States.[493]

The *local rail freight assistance program* seeks to maintain efficient local rail freight services.[494] The program provides funds to State agencies in the form of project grants.[495] This program is due to be phased out in 1996.[496]

## Organization, Budget, Staffing, and Workload

### Organization and Responsibilities

Primary responsibility for Title VI enforcement at the FRA falls to the Office of Civil Rights (FRA/OCR).[497] FRA/OCR is headed by a Director. It is located in the Office of Special Staff, the head of which reports to the Administrator.[498] The FRA does not operate regional offices.[499]

FRA/OCR is responsible for all civil rights matters at the FRA, including external civil rights enforcement, minority business enterprise (MBE), and equal opportunity matters.[500] In addition to the MBE program and equal opportunity matters, it implements the nondiscrimination provisions of Title VI, section 905, of the Railroad Revitalization and Regulatory Reform Act of 1976,[501] the Age Discrimination Act of 1975,[502] Title IX of the Education Amendment Act of 1972,[503] section 504 of the Rehabilitation Act of 1973,[504] and Title II of the Americans with Disabilities Act of 1990.[505]

### Budget, Staffing, and Workload

FRA/OCR has its own budget account with line items for personnel, travel, training, information technology, contracting, and other items. However, the budget does not allocate FTEs across various civil rights activities, such as preaward reviews, postaward reviews, complaint investigations, and provision of technical assistance. Thus, FRA/OCR does not track its civil rights expenditures by civil rights activity. As a result, the FRA is unlikely to be able to engage in serious management planning of its civil rights activities.

Information on staffing and workload indicate that FRA/OCR has suffered from a declining staff and increased responsibilities. FRA/OCR's staff has declined since 1981, when it had nine FTEs.[506] During the period between 1990 and 1994, FRA/OCR had a total staff of five FTEs. In 1992, one staff member retired, but FRA/OCR filled the position during that year. However, since August 1993, FRA/OCR has functioned with four staff persons, because one person is on an extended detail to another office. Until the recent DOT reorganization, FRA/OCR had one person assigned to internal equal employment opportunity; one staff member detailed to the MBE program; and two working on external civil rights, including Title VI. The Director of FRA/OCR divided his time between MBE issues, internal equal employment opportunity, and external civil rights programs.[507] Under the reorganization, FRA/OCR lost one staff member, the person who was assigned to internal complaint processing, to the Office of the Secretary's OCR.[508]

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[493] Ibid.

[494] Ibid., p. 457.

[495] Ibid.

[496] Miles S. Washington, Jr., Director, Office of Civil Rights, Federal Railroad Administration, U.S. Department of Transportation, interview in Washington, D.C., February 9, 1995, p. 1 (hereafter cited as Washington February 1995 interview).

[497] In addition to Title VI, the Federal Railroad Administration's civil rights enforcement responsibilities include: section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988 and Supp. V 1993); the Americans with Disabilities Act, 42 U.S.C. §§ 12,101–12,213 (Supp. V 1993); Title IX of the Education Amendments Act of 1972, 20 U.S.C. §§ 1681–1688 (1988); and the Age Discrimination Act of 1975, 42 U.S.C. §§ 6101–6107 (1988).

[498] U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Transportation, Federal Railroad Administration, Appendix 1 (Organization Chart) (hereafter cited as DOT/FRA Survey).

[499] Ibid., Q. 37, p. 31.

[500] Ibid., Appendix 2 (Mission and Function Statement).

[501] Pub. L. No. 94–210 § 905, 90 Stat. 31, 148–149 (formerly codified at 45 U.S.C. § 803 (1988); *repealed by* Revision of Title 49, U.S.C.A., Pub. L. No. 97–449, (87)(b), 96 Stat. 2413, 2443–2445 (1983).

[502] 42 U.S.C. §§ 6101–6107 (1988).

[503] 20 U.S.C. § 1681–1688 (1988).

[504] 29 U.S.C. § 794 (1988 & Supp. V 1993).

[505] 42 U.S.C. §§ 12,131–12,134 (Supp. V 1993). *See* DOT/FRA FY 1994 Implementation Plan, p. 1; DOT/FRA Survey, Q. 22, pp. 17–18.

In 1980, DOT issued MBE regulations.[509] Since then, the regulations have undergone many changes which have resulted in more appeals being filed with DOT. In addition, the Civil Rights Restoration Act of 1987[510] and the Americans with Disabilities Act have added to FRA/OCR's responsibilities and, as a result, its workload.[511]

The FRA/OCR's declining staff and increasing workload have resulted in the FRA almost totally abandoning any meaningful Title VI enforcement activities.

### DOT Reorganization

The originally proposed DOT reorganization would have reassigned the entire staff of FRA/OCR to the Secretary's Office of Civil Rights,[512] in effect, abolishing FRA/OCR. However, the FRA would have retained responsibility for the affirmative action, special emphasis, and diversity programs.[513] Because the reorganization is currently on hold, FRA/OCR's structure has remained intact, with the exception of the one staff member transferred to the Office of the Secretary's OCR.[514] However, the Director of FRA/OCR indicated that the prospect of future reorganization has brought civil rights to a standstill, as his office and other DOT civil rights office wait to see if and when the proposed DOT reorganization is accomplished.[515]

## Regulations, Guidelines, Policies, and Procedures

The FRA does not have its own Title VI regulations. Consequently, the administration operates under DOT's Title VI regulations[516] and DOT Order 1000.12.[517]

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[506] DOT/FRA Survey, Q. 26, p. 21.

[507] Miles S. Washington, Jr., Director, Office of Civil Rights, Federal Railroad Administration, U.S. Department of Transportation, letter to Frederick D. Isler, Acting Assistant Staff Director, U.S. Commission on Civil Rights, July 25, 1994, p. 1 (hereafter cited as Washington letter). *See also* DOT/FRA FY 1994 Implementation Plan, p. 3.

[508] Washington February 1995 interview, p. 1.

[509] 45 Fed. Reg. 21,172 (1980)(codified at 49 C.F.R. Part 23 (1994)). *See also* "Guidance for Implementing Department of Transportation Rules Creating a Minority Business Enterprise Program in DOT Financial Assistance Programs," 45 Fed. Reg. 45,281 (1980).

[510] Pub. L. No. 100–259, 102 Stat. 28 (codified as amended at 20 U.S.C. §§ 1681note, 1687, 1687note, 1688, 1688note (1988); 29 U.S.C. §§ 706, 794 (1988 & Supp. V 1993); 42 U.S.C. §§ 2000d-4a, 6107 (1988)).

[511] DOT/FRA Survey, Q. 27, p. 21.

[512] Miles S. Washington, Jr., Director, Office of Civil Rights, Federal Railroad Administration, U.S. Department of Transportation, interview in Washington, D.C., Sept. 20, 1994, p. 1 (hereafter cited as Washington September 1994 interview).

[513] Ibid.

[514] Washington February 1995 interview, p. 1.

[515] Miles S. Washington, Jr., Director, Office of Civil Rights, Federal Railroad Administration, U.S. Department of Transportation, interview in Washington, D.C., Apr. 20, 1995.

The Director of FRA/OCR indicated that the FRA enforces the regulations for section 905 of the Railroad Revitalization and Regulatory Reform Act of 1976[518] rather than the Department's Title VI regulations to avoid duplicate and overlapping requirements.[519] According to him, the implementation of the section 905 regulations allows achievement of statutory and policy objectives without having to implement and enforce two separate regulations.[520]

The FRA did not provide the Commission with evidence that it has developed Title VI guideline for its programs, issued any policy statements on Title VI, or generated its own Title VI enforcement procedures. This lack of activity indicates that the FRA lacks commitment to conduct meaningful Title VI enforcement.

## Process of Title VI Enforcement

### Preaward Reviews

The FRA conducts preaward reviews when new applicants apply for financial assistance.[521] In fiscal year 1992, all 48 recipients[522] of the FRA's $570 million in assistance[523] underwent the preaward review process.[524] In fiscal year 1993, the number of recipients increased to 51, all of which underwent preaward reviews.[525] None of the 99 reviews for the above period resulted in the denial of an award.[526]

### Postaward Desk-Audit and Onsite Compliance Reviews

FRA/OCR conducts postaward reviews, consisting of desk audits or onsite visits, one year after the release of financial assistance.[527] The review includes an evaluation of recipients' equal employment opportunity accomplishments, an analysis of recipients' applicant flow data for the previous year, and a review of goals, training activities, and discrimination complaints.[528] During onsite visits, FRA/OCR examines the recipients' program implementation to ascertain whether they are doing what is prescribed in their affirmative action plans.[529]

However, the Director of FRA/OCR indicated that the FRA conducts postaward desk-audit reviews for section 905 recipients only.[530] The FRA conducted 16 postaward desk-audit reviews in fiscal year 1991, 24 in fiscal year 1992, 34 in fiscal year 1993, and 25 in fiscal year 1994.[531] None of FRA/OCR's reviews resulted in a finding of noncompliance.[532]

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[516] 29 C.F.R. Part 21 (1994).

[517] U.S. Department of Transportation, Order 1000.12, "Implementation of the Department of Transportation Title VI Program" (hereafter cited as DOT Order 1000.12).

[518] Pub. L. No. 94–210, 90 Stat. 31, 148–49 (codified at 45 U.S.C. § 803, *repealed by* Pub. L. No. 97–449, § 7(b), 96 Stat. 2443). *See* 49 C.F.R. Part 265 (1994).

[519] Washington letter, p. 1.

[520] Ibid.

[521] Washington letter, p. 2; DOT/FRA FY 1994 Implementation Plan, p. 3.

[522] DOT/FRA Survey, Q. 41(b), p. 34.

[523] Ibid., Q. 41(d), p. 34.

[524] Ibid., Q. 41(e), p. 34.

[525] Ibid., Q. 41(b), p. 34.

[526] Ibid., Q. 41(g), p. 35.

[527] DOT/FRA FY 1994 Implementation Plan, p. 4.

[528] Ibid.

[529] Ibid.

[530] Washington letter, p. 2.

Furthermore, the FRA has conducted no onsite compliance reviews of State agencies or program recipients for the last 5 years.[533] The Director of FRA/OCR explained that a lack of travel funds prevented his office from conducting such reviews. He added that the FRA has a memorandum of understanding with the Federal Highway Administration and the Federal Transit Administration regarding onsite compliance reviews that enables the FRA to "piggyback" on these two administrations' compliance reviews.[534]

Thus, many FRA recipients are not covered by its postaward reviews. As a result, the FRA effectively has abandoned proactive Title VI enforcement for all but section 905 recipients.

### Complaint Investigations

Currently, FRA/OCR shares the responsibility for investigating complaints against rail recipients with an FRA program office because of inadequate staffing and resources.[535] The FRA reviews complaints to determine jurisdiction under section 504 of the Rehabilitation Act of 1973.[536] If there is no jurisdiction, it refers the complaint to the Department of Justice, the Office of the Secretary's OCR, or the Equal Employment Opportunity Commission.[537] In 1993, FRA received five Title VI complaints.[538] The FRA received no Title VI complaints in fiscal year 1992.[539]

### Outreach and Education

The FRA does not publicize program information and/or requests for proposals.[540] In addition, the Administration contends that it does not have the resources necessary to publicize the name and contact information for its Title VI compliance officers and/or contract officer.[541] The Administration does not offer training seminars for its recipients.[542]

According to the Director of FRA/OCR, the FRA provides Federal grants to State recipients for outreach and education. Therefore, he contends that FRA/OCR does not need to conduct outreach or educational activities.[543]

### Technical Assistance

The FRA reported that recipients receive technical assistance on an as-needed basis.[544]

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[531] Ibid., p. 2. *See also* DOT/FRA FY 1994 Implementation Plan, p. 21. These numbers are inconsistent with those reported in FRA's survey response, which indicated that FRA had completed 48 postaward desk-audit reviews in 1992 and 53 in 1993. DOT/FRA Survey, Q. 45, p. 38.

[532] DOT/FRA Survey, Q. 45(b), p. 38.

[533] Ibid., Q. 63, p. 44.

[534] Washington September 1994 interview, p. 2.

[535] DOT/FRA FY 1994 Implementation Plan, p. 2.

[536] Ibid., p. 3.

[537] Ibid.

[538] Ibid., p. 13.

[539] DOT/FRA Survey, Q. 71, p. 50.

[540] Ibid., Q. 46, p. 39.

[541] Ibid.

[542] Ibid., Q. 52, p. 40.

[543] Washington letter, p. 3.

[544] Ibid., p. 3; DOT/FRA FY 1994 Implementation Plan, p. 5.

Generally, it responds to technical assistance requests by telephone.[545] On occasion, it initiates assistance through desk-audit reviews and communicates findings and recommendations in writing to the recipient.[546] The FRA has provided technical assistance to State and railroad recipients within the last 5 years. For example, it has explained regulatory requirements to new personnel and has discussed agency program and contracting, as well as new policies affecting recipients' minority business enterprise (MBE) programs.[547] However, the Director of FRA/OCR indicated that the technical assistance did not focus on Title VI.[548] Thus, the FRA is not engaged actively in the provision of technical assistance on Title VI.

## Monitoring State Title VI Enforcement

Under regulations implementing section 905 of the Railroad Revitalization and Regulatory Reform Act, State recipients must submit an affirmative action plan and standard DOT Title VI assurances with their grant applications.[549] Onsite compliance reviews determine compliance with section 905. According to the Director of FRA/OCR, the FRA verifies that the State is fulfilling commitments in its affirmative action plan. He also wrote that due to an "austere budget," the FRA did not conduct onsite compliance reviews for State recipients in 1994.[550]

## Staff Training

FRA/OCR is responsible for training its own civil rights staff in conjunction with the Office of the Secretary's OCR.[551] It also is responsible for training program managers, contract officers, and project officers.[552] However, FRA does not conduct training seminars for State and local agency staff[553] and recipients.[554]

According to the Director of FRA/OCR, the civil rights staff has not received Title VI training since before 1990.[555] In fiscal year 1993, FRA/OCR training was limited to ongoing equal employment opportunity training and sensitivity training for managers and supervisors and sexual harassment training conducted by an outside contractor.[556]

## Reporting Requirements, Data Collection, and Analysis

The FRA requires recipients to develop a system for establishing base data that identifies eligible populations and measures delivery of program benefits.[557] However, because the MBE program requires annual commitments on minority participation and targeting, the FRA does not require recipients to assess annual minority participation in each program and compare those figures with established targets.[558] For the same reason, the FRA does not require recipients to submit an annual report comparing program participation with program eligibility.[559] The Director of FRA/OCR explained that FRA has sought to avoid "duplicate and overlapping reporting and record keeping requirements being imposed on recipients."[560] Thus, FRA's concern for duplicate and overlapping requirements prevents it from collecting adequate data to enforce Title VI effectively.

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[545] Washington September 1994 interview, p. 3.

[546] Washington letter, p. 3.

[547] Ibid.

[548] Ibid.

[549] Ibid., p. 2.

[550] Ibid., p. 3. He noted that onsite Minority Business Enterprise (MBE) compliance reviews were conducted for two railroad recipients. Currently, FRA has 509 recipients.

[551] DOT/FRA Survey, Q. 25(i), p. 20.

[552] Ibid.

[553] Ibid., Q. 51, p. 40.

[554] Ibid., Q. 52, p. 40.

[555] Washington letter, p. 3.

[556] DOT/FRA FY 1994 Implementation Plan, p. 8.

[557] DOT/FRA Survey, Q. 59, p. 43.

The Director of FRA/OCR informed the Commission that the FRA uses a "manual system" to track data. An analysis of agency employment totals by category is compared with the available population to determine discriminatory hiring procedures. An external specialist is responsible for analyzing and disseminating data.[561] The FRA/OCR Director indicated that the FRA lacks the software necessary to track pertinent data and that no database system is available.[562]

## Civil Rights Implementation Plans

The Commission reviewed the FRA's fiscal year 1994 Civil Rights Implementation Plan.[563] The plan covers base fiscal years 1994 through 1997.[564] The plan contains a brief overview of the FRA's civil rights enforcement program. Although the overview follows the outline provided by the Department of Justice's guidelines,[565] it is too cursory to serve as a basis for a Department of Justice review of the FRA's civil rights implementation and enforcement program or to serve as an informational tool for the general public.[566]

The plan's "goals and objectives" section is particularly deficient. The FRA identified the following as its long-range policy goal:

> FRA plans to provide technical assistance to several State recipients inasmuch as their EEO personnel have changed. In order to maintain compliance, we must assure that the recipients understand the requirements, and what is expected as pertains to the regulations. We have identified potential problems with a number of States, and because of joint responsibility we plan to work with FHWA regional offices.[567]

The FRA's major objectives are outlined as follows:

> Assistance is needed by several State recipients who are barely in compliance. Our intention is to work closely with FHWA regional civil rights staff in order to achieve this goal. This endeavor will require much communication since FHWA will have, in some cases, personal contact with the State representatives responsible for the development of the EEO/AA program.[568]

The major objectives do not conform to the Department of Justice requirement that there be at least one major objective for each functional category (e.g., complaint processing, preaward reviews, etc.).[569] Furthermore, they do not "imply criteria for measuring accomplishments."[570] The plan contains only one short-term objective.[571] The objective is "to obtain consistent and effective enforcement, while maintaining compliance," and the narrative describing the task is very vague.[572]

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[558] Ibid., Q. 61, p. 43.

[559] Ibid., Q. 62, p. 43.

[560] Washington letter, p. 1. In view of the reporting requirements at FRA, this section is related to section 905 and *not* Title VI.

[561] Ibid.

[562] DOT/FRA FY 1994 Implementation Plan, p. 6.

[563] Ibid.

[564] Ibid., p. 1.

[565] *See* DOJ Guideline for Agency Implementation Plans, pp. 4–11.

[566] The Department of Justice has indicated that these are two purposes of the Civil Rights Implementation Plans. *See* ibid., pp. 3–4.

[567] Ibid. p. 7.

[568] Ibid., p. 8.

In addition to its long-range goals and objectives, the plan also contains a progress report that discusses the status of FRA enforcement relative to its goals and objectives.[573] The FRA acknowledged that it did not achieve the long-range goals and major objectives established in the base-year plan.[574] It also reported that it did not complete onsite reviews, as well as other projects, because of an "austere" budget.[575]

The inadequacy of the plan's "goals and objectives" section indicates that the FRA does not use the plan as a management tool.[576]

## Findings and Recommendations

### Organization, Budget, Staffing, and Workload

#### Organization

**Finding:** Given that the Federal Railroad Administration (FRA) has such a small civil rights staff, combining them all in a single office without creating separate administrative units for internal civil rights and external civil rights is acceptable. However, a deficiency in the FRA's civil rights organizational structure is that the Director of FRA's Office of Civil Rights (FRA/OCR) does not report directly to the FRA Administrator.[577]

**Recommendation:** The FRA should change its lines of authority so that the Director of FRA/OCR reports directly to the Administrator of the FRA.

#### Budget, Staffing, and Workload

**Finding:** The FRA has too few staff to carry out an effective Title VI enforcement program. The few staff that the FRA has are struggling with an increasing workload brought about by the enactment of the Americans with Disabilities Act and the revisions to DOT's disadvantaged business enterprise regulations.[578]

**Recommendation:** The FRA should commit additional resources to its civil rights enforcement activities. The amount of additional resources committed should be guided by civil rights planning based on the information management system recommended below.

**Finding:** The FRA does not have in place an information management system that permits it to track its expenditures and workload for different civil rights statutes and functions. As a result, FRA/OCR cannot engage in effective management planning of its civil rights activities.[579]

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[569] *See* DOJ Guideline for Agency Implementation Plans, p. 9.

[570] *See* ibid.

[571] DOT/FRA FY 1994 Implementation Plan, p. 9. The Department of Justice requires that there be at least one short-term objective in each of the functional areas, at it does for major objectives. DOJ Guideline for Agency Implementation Plans, p. 10.

[572] Ibid.

[573] Ibid., p. 8.

[574] Ibid.

[575] Ibid.

[576] This is one of the purposes given by the Department of Justice for Civil Rights Implementation Plans. DOJ Guideline for Agency Implementation Plans, p. 3.

[577] *See* p. 558.

[578] *See* pp. 558–59.

[579] *See* p. 558.

**Recommendation:** FRA/OCR should develop and implement an information management system that allows it to track its civil rights expenditures separately for different civil rights statutes and across civil rights activities. FRA/OCR should use this information management system in developing an annual Title VI enforcement plan that lays out specific goals and objectives to be accomplished and assigns specific resources to the necessary tasks. In addition, FRA/OCR should use the system in preparing budget requests. The system should permit it to show that its resources are not commensurate with its workload.

## Regulations, Guidelines, Policies, and Procedures

**Finding:** The FRA has issued no regulations, guidelines, policies, or procedures on Title VI. Thus, it does not have in place the basic structure needed for an effective Title VI enforcement program.[580]

**Recommendation:** The FRA should commit itself to developing the necessary regulations, guidelines, and procedures to serve as a foundation for an effective Title VI program and to update or expand on these regularly through the issuance of policy statements. The FRA needs a basic regulation specifying the general Title VI responsibilities of FRA/OCR, the FRA's program offices, and the FRA's recipients. In addition, the FRA should develop Title VI guidelines for each of its federally assisted programs. These guidelines should be modeled after the Title VI regulations of the Federal Highway Administration, but be modified to fit the nature of the FRA's programs. For instance, to the extent that the FRA provides funding through project grants rather than through continuing State programs, the need to delegate compliance responsibilities to States is lessened. Furthermore, preaward reviews may play a greater role in a program that funds project grants. The guidelines should specify the data recipients need to submit and the analyses that the FRA should conduct using the data. Finally, the FRA should develop a procedures manual describing the basic procedures for conducting preaward and postaward compliance reviews, complaint investigations, and effecting compliance. The procedures manual should include a discussion of the types of information that must be considered in compliance reviews and complaint investigations before a finding of compliance or noncompliance is reached.

## Process of Title VI Enforcement

### Postaward Reviews

**Finding:** The FRA's postaward reviews are limited to section 905 recipients and focus primarily on their fulfillment of their equal employment opportunity and affirmative action responsibilities rather than the broader issues covered by Title VI. Furthermore, budget constraints have prevented FRA/OCR from conducting onsite postaward compliance reviews since 1994.[581]

**Recommendation:** The FRA should commit sufficient resources to FRA/OCR for it to accomplish a reasonable number of postaward onsite compliance reviews each year. FRA/OCR should broaden the focus of its onsite compliance reviews beyond recipients' employment practices to include in the reviews evaluations of access to and treatment within recipients' programs as well as the possibility of adverse impact, which are essential for determining compliance with Title VI.

### Complaint Investigations

**Finding:** Because of resource constraints, FRA/OCR shares complaint investigation with an FRA program office. Furthermore, FRA/OCR does not have complaint processing and investigation procedures. Therefore, the quality of the complaint investigations performed by the FRA is open to question.[582]

**Recommendation:** FRA/OCR should develop and issue complaint processing and investigation procedures that not only delineate the process of handling a complaint, but also indicate the types of information to be considered in reaching a finding of compliance or noncompliance. In addition, FRA/OCR should request additional resources so that all complaint processing and investigation can be conducted by trained civil rights staff operating out of FRA/OCR.

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[580] *See* pp. 559–60.

[581] *See* pp. 560–61.

[582] *See* p. 561.

### Outreach and Education

**Finding:** FRA/OCR does not conduct outreach and education on Title VI or on the FRA's programs.[583]

**Recommendation:** FRA/OCR should take the lead in conducting outreach and education on Title VI. In addition to providing grants for outreach and education to State recipients, FRA/OCR should develop a strategic plan to ensure that all FRA recipients, program participants, intended beneficiaries, and the public are aware of their rights and responsibilities under Title VI. Intended beneficiaries should be fully informed of the nature of the FRA's federally assisted programs and the possibility of participating in them. The strategic plan should retain FRA/OCR's current practice of providing grants for outreach and education to State recipients, but should also include expanded involvement in outreach and education by FRA/OCR. Examples of outreach and education activities that FRA/OCR should engage in are developing informational brochures and posters, in English and in other languages, and participating in conferences and other forums attended by FRA recipients, program participants, or intended beneficiaries.

### Technical Assistance

**Finding:** FRA/OCR provides very little technical assistance on Title VI to its recipients.[584]

**Recommendation:** FRA/OCR should follow the model provided by the Federal Highway Administration in providing comprehensive technical asistance to the FRA's recipients. In particular, technical assistance should be provided proactively, not just on an as-needed or upon-request basis.

## Monitoring of State Recipients

**Finding:** FRA/OCR did not conduct any onsite reviews of the FRA's State recipients in fiscal year 1994 because of an austere budget.[585]

**Recommendation:** FRA should provide FRA/OCR with sufficient resources for it to conduct periodic onsite compliance reviews of its State recipients.

## Staff Training

**Finding:** The FRA has not provided Title VI training to its civil rights staff in the past 5 years and never provides such training to State and local agency staff or recipients.[586]

**Recommendation:** FRA/OCR should implement a staff training program immediately. All civil rights staff should be provided with regular, formal training on Title VI and other civil rights statutes. The training should be designed to refresh and deepen their understanding of Title VI, as well as to address emerging Title VI issues. In addition, FRA/OCR should provide Title VI training to recipients' staff, particularly if the recipients' are given significant Title VI compliance responsibilities. Such training could be offered in annual civil rights conferences, such as those convened by the Federal Highway Administration.

## Reporting Requirements, Data Collection, and Data Analysis

**Finding:** The FRA does not have in place an adequate data collection and analysis system. The system is limited to collecting information on the use of minority contractors by recipients, but does not collect the broader array of data necessary to monitor recipients' compliance with Title VI.[587]

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[583] *See* p. 561.

[584] *See* pp. 561–62.

[585] *See* p. 562.

[586] *See* p. 562.

[587] *See* pp. 562–63.

**Recommendation:** The FRA should require recipients to report data on program participants, program applicants, and the eligible population by race, color, and national origin. In addition, the FRA should require recipients receiving funds for large projects to provide analyses of the demographic composition of the affected community and any adverse impact the project might have. The FRA should integrate analysis of these data into its Title VI compliance and enforcement process.

### Civil Rights Implementation Plans

**Finding:** The FRA's Civil Rights Implementation Plan does not fulfill the purposes envisioned by the U.S. Department of Justice in its "Guideline for Agency Implementation Plans Required by Executive Order 12,250, 'Leadership and Coordination on Nondiscrimination Laws.'" It does not provide sufficient information for the Department of Justice or the public to gain an understanding of the FRA's civil rights enforcement program. It does not have goals and objectives for all parts of the Title VI implementation process, and the goals it does have are vague and do not imply criteria for measuring accomplishment. Finally, FRA/OCR is not using the plan as a management tool.[588]

**Recommendation:** The FRA should develop its Civil Rights Implementation Plans in conformance with the Department of Justice guideline. In particular, the FRA should describe its civil rights enforcement process more fully. Furthermore, the FRA should develop specific goals and objectives, with measures and timeframes for accomplishing them, for each part of the Title VI implementation process. Finally, the FRA should use the plans as a management tool. Thus, the plans should be sufficiently specific and detailed to serve as a civil rights enforcement plan.

## Federal Transit Administration

The Federal Transit Administration (FTA), formerly the Urban Mass Transportation Administration, assists in the development of improved public and private mass transit systems and encourages the planning and establishment of urban mass transportation systems. It also assists State and local governments in financing mass transportation systems and enhancing the mobility of the elderly, persons with disabilities, and economically disadvantaged persons specifically.[589]

### Federally Assisted Programs

In fiscal year 1993 the FTA provided financial assistance of approximately $3.4 billion to 643 recipients in the following programs:[590]

*Federal transit capital improvement grants* assist in financing the acquisition, construction, reconstruction, and improvement of facilities and equipment for use, by operation, lease, or otherwise, in mass transportation service in urban areas and in coordinating service with highway and other transportation.[591] Assistance is in the form of formula grants and project grants to public agencies and public corporations established under State law.[592]

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[588] *See* pp. 563–64.

[589] Office of the Federal Register and the National Archives and Records Administration, *The United States Government Manual, 1994/95* (Superintendent of Documents: Washington, D.C., 1994), p. 472.

[590] U.S. Department of Transportation, Federal Transit Administration, "Fiscal Year 1994 Civil Rights Implementation Plan," Workload and Performance Data, p. 10 (hereafter cited as DOT/FTA FY 1994 Implementation Plan).

These numbers are inconsistent with those the FTA reported to the U.S. Commission on Civil Rights in its survey response. The survey response indicated that the FTA provided a total of $4.6 billion to 2,100 recipients in fiscal year 1993. U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Transportation, Federal Transit Administration, Q. 33, p. 29 (hereafter cited as DOT/FTA Survey).

[591] Office of Management and Budget and U.S. General Services Administration, *1993 Catalog of Federal Domestic Assistance* (Superintendent of Documents: Washington, D.C., 1993), vol. 1, p. 458.

*Federal transit grants for university research training* sponsor research studies and training in the problems of transportation in urban areas, encourage students to seek transit careers, and increase cooperative interchanges between transit operators and the academic community.[593] Assistance is in the form of project grants to institutions of higher education.[594]

*Federal transit managerial training grants* provide fellowships for training of managerial, technical, and professional personnel employed in the transit field.[595] Assistance is in the form of project grants to State and local public bodies and operators of transit systems.[596]

*Federal transit technical studies grants* assist in development of cost-effective transportation improvement programs, including the preparation of transportation plans and surveys and evaluations of previously funded projects.[597] Assistance is in the form of formula and project grants to the States for distribution to metropolitan planning organizations to be used in urbanized areas.[598]

*Federal transit capital and operating assistance formula grants* assist in financing the acquisition, construction, cost-effective leasing, planning, and improvement of facilities and equipment for use by operation or lease or otherwise in mass transportation service, and the payment of operating expenses to improve or to continue such service by operation, lease, contract or otherwise.[599] Assistance is in the form of formula grants to urban-area recipients designated by the Governors and other officials.[600]

*Public transportation for nonurbanized areas grants* seek to enhance public transportation service in nonurbanized areas by providing financial assistance for the acquisition, construction, and improvement of facilities and equipment and the payment of operating expenses by operating contract, lease, or otherwise.[601] Assistance is in the form of formula grants to State and local agencies, nonprofit organizations, Indian tribes, and operators of transit services.[602]

*Human resource programs* provide financial assistance for national and local programs that address human resource needs, particularly those of minorities and women, as they apply to public transportation activities.[603] Assistance is given in the form of project grants and technical assistance to State and local agencies, institutions of higher education, and nonprofit institutions.[604]

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[592] Ibid.

[593] Ibid.

[594] Ibid.

[595] Ibid., p. 459.

[596] Ibid.

[597] Ibid., p. 460.

[598] Ibid., p. 461.

[599] Ibid.

[600] Ibid.

[601] Ibid., p. 462.

[602] Ibid.

[603] Ibid., p. 463.

*Federal transit technical assistance* seeks to improve mass transportation service, to contribute toward meeting total urban transportation needs at a minimum cost, and to assist in the reduction of urban transportation needs by improving the ability of transit industry operating officials to plan, manage, and operate their systems more effectively and safely.[605] Assistance is in the form of project grants, dissemination of technical information, and training to State and local governments, transit agencies, for-profit and nonprofit organizations, universities, and individuals.[606]

*The capital assistance program for elderly persons and persons with disabilities* provides financial assistance in meeting the transportation needs of elderly persons and persons with disabilities.[607] Assistance is in the form of project grants.[608]

*Transit planning and research* funding is designed to improve mass transit service, to contribute toward meeting total transit needs at minimum cost, and to assist in the reduction of transit needs by improving the ability of transit industry operating officials to plan, manage, and operate their systems more effectively and safely; to provide fellowships for training of managerial, technical, and professional personnel employed in the transit field.[609] Assistance is given in the form of project grants, technical assistance, and training to State and local governments, transit agencies, private organizations, profit organizations, nonprofit organizations, universities, and individuals.[610]

## Organization, Budget, Staffing, and Workload

### Organization and Responsibilities

Enforcement of Title VI and other civil rights statutes[611] at the FTA is the responsibility of the Office of Civil Rights (FTA/OCR). FTA/OCR is responsible for FTA's internal and external civil rights enforcement, its disadvantaged business enterprise program, and relocation assistance issues.[612] FTA/OCR reviews FTA grants and the internal activities of its grantees for compliance with Federal civil rights legislation, directives, and program requirements.[613]

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[604] Ibid.

[605] Ibid., p. 464.

[606] Ibid., p. 465.

[607] Ibid., p. 466.

[608] Ibid.

[609] Ibid., p. 467.

[610] Ibid.

[611] In addition to Title VI, the FTA enforces: Executive Order 11,625, Oct. 14, 1971; Executive Order 11,764; the Federal Transit Act; the Department of Justice's and the Equal Employment Opportunity Commission's joint regulations, 28 C.F.R. Part 42 and 29 C.F.R. Part 1691; the Department of Transportation's Title VI Regulations, 49 C.F.R. Part 21 (1994); section 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102–240, 105 Stat. 1914 (codified as amended in scattered sections of U.S.C); DOT's Disadvantaged Business Enterprise Regulation, 49 C.F.R. Part 23 (1994); the Small Business Size Standards regulation, 13 C.F.R. Part 121 (1993); Joint Planning Regulations of the Federal Transit Administration and the Federal Highway Administration, 23 C.F.R. Part 40 (1994) and 49 C.F.R. 613 (1994); the Transportation for Individuals with Disabilities regulation, 49 C.F.R. Parts 27, 37, and 38 (1994); section 504 of the Rehabilitation Act of 1973, 29 U.S.C § 794 (1988 & Supp. V 1993); and the Americans with Disabilities Act, 42 U.S.C. §§ 12,101–12,213 (Supp. V 1993).

[612] DOT/FTA FY 1994 Implementation Plan, pp. 3–4.

FTA/OCR is headed by a Director, who reports to the Administrator. FTA/OCR has three divisions: Operations, Area Administration Management, and Program Management; a Policy and Support Staff; and 10 regional offices.[614] The regional civil rights staff report to the Director of FTA/OCR through the Acting Chief of the Area Administration Management Division.[615]

The FTA/OCR headquarters office is responsible for "policy development and dissemination, program development and uniform implementation; technical assistance; monitoring regions' implementation of programs and procedures; coordination with the Office of the Secretary of Transportation; conducting complaint investigations; and management of human resource projects."[616] The regional offices are responsible for monitoring FTA grant recipients.[617]

FTA/OCR restructured its divisions at least four times between fiscal year 1976 and fiscal year 1993.[618] According to FTA/OCR:

> Each restructuring was designed to better facilitate the needs of the office and/or to meet the increase in civil rights program responsibilities. The restructuring was to achieve a more responsive, orderly, and timely performance of required civil rights duties.[619]

In 1993, FTA/OCR became responsible for processing and investigation of discrimination complaints relating to section 504 of the Rehabilitation Act of 1973[620] and the Americans with Disabilities Act of 1990.[621] This responsibility had previously belonged to the Office of the Secretary's OCR. The FTA expects that this additional responsibility will necessitate additional budgetary and staff resources.[622]

In 1992 the FTA issued an internal order transferring responsibility for the regional offices' civil rights activities from FTA/OCR to the regional administrators.[623] Under the order, "the responsibilities and activities of the Regional Civil Rights Officers [would have been] 'mainstreamed' into the grant management activities of the Regional Offices," and the regional civil rights staff would have reported to the regional administrators. The FTA also planned to create an Office of Oversight in FTA headquarters to monitor grant recipients' compliance with all statutory and administrative requirements, particularly affecting financial and budgetary matters.[624] The oversight office would also monitor the FTA regions' civil rights activities. Under the order, the FTA regional administrators would have reported on civil rights matters to the oversight office, not to FTA/OCR.[625] The order would have shifted conducting and monitoring of compliance reviews from FTA/OCR to the Office of Oversight.[626] This reorganization plan was opposed by FTA/OCR and was not implemented.[627]

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[613] Ibid., p. 1. These programs include the following: Equal Employment Opportunity (EEO), Disadvantaged Business Enterprise (DBE), the distribution of transportation and related benefits (Title VI of the Civil Rights Act of 1964, Relocation and Relocation Assistance), and nondiscrimination on the basis of disability. Ibid.

[614] Ibid., attachment 4 "Organizational Chart for UMTA/FTA Office of Civil Rights FY 1988, 1992, & 1993."

[615] Susan E. Schruth, Acting Director, Office of Civil Rights, Federal Transit Administration, U.S. Department of Transportation, letter to Frederick D. Isler, Acting Assistant Staff Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, Aug. 17, 1994, attachment, p. 2 (hereafter cited as Schruth letter).

[616] DOT/FTA FY 1994 Implementation Plan, p. 7.

[617] Ibid.

[618] DOT/FTA Survey, Q. 26, p. 24.

[619] Ibid.

[620] 29 U.S.C. § 794 (1988 & Supp. V 1993).

[621] 42 U.S.C. §§ 12,101–12,213 (Supp. V 1993). *See* DOT/FTA FY 1994 Implementation Plan, p. 8.

[622] Ibid.

[623] U.S. Department of Transportation, Federal Transit Administration, "Determination and Transfer Notice: Transfer and Abolishment of Regional Civil Rights Officers," FTA N 1050.16, Dec. 1, 1992 (hereafter cited as DOT/FTA Regional Civil Rights Officers Transfer Order).

The current organization of FTA/OCR, which gives the Director of FTA/OCR control over all of the civil rights activities carried out by the FTA is far preferable to one in which civil rights responsibilities are fragmented between headquarters and regional offices and between two headquarters offices. The FTA is the only DOT modal administration in which regional staff report to the civil rights office. Another strong feature of the FTA/OCR's current organizational structure is that the Director of FTA/OCR reports directly to the Administrator. This line of reporting gives FTA/OCR sufficient status within the FTA to ensure that civil rights enforcement is not neglected at the expense of other Administration priorities.

### Budget, Staffing, and Workload

The FTA did not provide information on its civil rights expenditures or budget, except for fiscal year 1984. In that year, the FTA devoted $6.6 million of its total budget of $4.3 billion to civil rights activities.[628] The failure of the FTA to report on its civil rights expenditures indicates a serious deficiency in the management structure of FTA/OCR. Without the ability to track expenditures generally and on individual civil rights statutes in particular, FTA/OCR is unable to make sound management decisions about the allocation of resources within the office. Furthermore, the FTA/OCR is unlikely to be able to provide the necessary supportive materials for any requested budget increases.

Staff size has decreased since fiscal year 1984, when FTA/OCR had a total of 28 staff members (18 in headquarters, 10 in the regional offices).[629] The number of regional staff fell gradually between 1987 and 1993.[630] In 1993, FTA/OCR had 18 full-time, permanent staff, including 14 professionals and 4 clerical workers, with 2 vacancies.[631] Five civil rights professional served as regional civil rights officers.[632] The number of full-time permanent staff fell again between 1993 and 1994, when, as noted above, FTA/OCR had 15 full-time permanent employees in its headquarters office and 5 in its regional offices. As of July 1994, FTA/OCR had a total civil rights staff of 21 employees in headquarters offices and 5 in regional offices. However, of the 21 headquarters employees, only 15 were full-time, permanent staff members, of which 11 were professionals and four were clerical workers. Two were students, two were interns, and two were on detail from another FTA office.[633] According to the FTA, the decreasing size of FTA/OCR was not the result of a formal downsizing. Staff levels decreased over time due to staff departures.[634]

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[624] DOT/FTA FY 1994 Implementation Plan, p. 9.

[625] Ibid.

[626] Ibid.

[627] Ibid.; Akira Sano, Acting Director, Office of Civil Rights, Federal Transit Administration, interview in Washington, D.C., Feb. 8, 1995, p. 1 (hereafter cited as Sano interview).

[628] DOT/FTA Survey, Q. 33, p. 29.

[629] DOT/FTA Survey, Q. 26, p. 24.

[630] Ibid.

[631] DOT/FTA FY 1994 Implementation Plan, p. 7.

[632] Ibid. Two of the five are stationed in FTA/OCR headquarters and each administers the civil rights program in the Boston and New York regions. The three remaining regional civil rights officers are located in the field covering the Fort Worth and Kansas City, Denver and San Francisco, and Seattle regions. Ibid.

None of the FTA civil rights staff works exclusively on Title VI. The FTA does not assign its equal opportunity specialists exclusively to one civil rights program.[635] In addition to implementing and enforcing Title VI, the equal opportunity specialists of the FTA are responsible for external equal employment opportunity matters, the disadvantaged business enterprise program, section 504 of the Rehabilitation Act, and the Americans with Disabilities Act.[636] Without a staff who specialize on Title VI issues, it very likely that FTA's Title VI enforcement is conducted by staff with relatively little Title VI experience. Furthermore, Title VI activities may be neglected because of the pressing demands for the enforcement of other civil rights statutes.

Although FTA/OCR's staff size has declined over time, its workload has increased with the implementation of new civil rights laws and regulations.[637] Furthermore, the number of FTA recipients has grown since 1976 because of the creation of new urbanized areas.[638] In addition, in 1993, FTA/OCR became responsible for processing and investigating discrimination complaints relating to the Americans with Disabilities Act and section 504 of the Rehabilitation Act. According to FTA/OCR, this additional responsibility "will necessitate budgetary and staffing reconsideration within the FTA Office of Civil Rights."[639] The Acting Director of FTA/OCR has indicated that a number of factors have made it difficult for his office to implement a Title VI program, including:

> administering other major civil rights programs, including EEO, DBE, ADA/Section 504 and the investigation of complaints; an extraordinarily high number of grantees that are in FTA's compliance universe; the explosion of work caused by added responsibilities in recent years, such as ADA and ADA-related complaints; and a decline in the number of FTA civil rights personnel in recent years.[640]

In face of the FTA's increasing workload, the decreasing staff, particularly in FTA/OCR's regional offices, has serious consequences for FTA/OCR's ability to enforce Title VI.

### DOT Reorganization

According to the Acting Director of FTA/OCR, the DOT reorganization,[641] as originally proposed, would have adversely affected the FTA in the following manner:

> This action would result in most of the FTA Office of Civil Rights' external compliance and monitoring responsibilities of FTA grant recipients being transferred to the Department. Civil rights programs retained by FTA would include the investigation of internal EEO discrimination complaints; the Human Resources Program that funds innovative projects. . . and the

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[633] Schruth letter, attachment, p. 1.

[634] DOT/FTA Survey, Q. 26, p. 24.

[635] Ibid., Q. 23, p. 21.

[636] Ibid.

[637] Ibid, Q. 27, p. 25.

[638] Ibid. *See also* Sano interview, p. 1.

[639] DOT/FTA FY 1994 Implementation Plan, p. 8.

[640] Akira Sano, Acting Director, Office of Civil Rights, Federal Transit Administration, U.S. Department of Transportation, letter to Frederick D. Isler, Acting Assistant Staff Director for Civil Rights Evaluation, U.S. Commission on Civil Rights, Apr. 18, 1995, p. 1 (hereafter cited as Sano letter).

[641] This discussion pertains to DOT's original proposed reorganization. Since Congress did not approve the reorganization in full, it is only being partially implemented.

agency's direct procurement involving small businesses, DBEs, women-owned firms, etc. . . . Contrary to the Department's contentions, it is our considered view that this consolidation moves the civil rights program further away from the agency's consumers, e.g., minority constituents, and although there will be civil rights officers who will be responsible for "FTA programs," the fact that these persons will be in the Departmental Civil Rights Office may result in weaker enforcement of FTA's present civil rights requirements.[642]

## Regulations, Guidelines, Policies, and Procedures

The FTA does not have its own Title VI regulations. DOT's Title VI regulations provide guidance for the FTA's civil rights enforcement.[643] However, the FTA has Title VI guidelines, which are outlined in a Urban Mass Transit Administration Circular, dated May 26, 1988.[644] The purpose of the guidelines is to provide guidance and instructions necessary to carry out Title VI through the prescription of requirements and procedures.[645]

The guidelines provide information on the following areas:

- Covered programs;
- Data collection and reporting requirements;
- Monitoring procedures for transit providers;
- Types of compliance reviews;
- Remedial actions and enforcement procedures;
- Title VI discrimination complaints; and
- Public information requirements.[646]

The FTA's Title VI guidelines are comprehensive. However, they are not accompanied by other FTA Title VI documents, such as policy statements and procedures manuals.

## Process of Title VI Enforcement

### Preaward Reviews

FTA grant recipients must submit equal employment opportunity, Title VI, disadvantaged business enterprise and Americans with Disabilities Act program submissions as a condition of eligibility for receiving FTA financial assistance.[647] FTA/OCR regional staff conduct "preaward application reviews" of all FTA grantees.[648] According to FTA/OCR's Acting Director:

> In each quarter of the Federal Fiscal Year, regional officers obtain the names of grantees whose grant applications are pending and will be approved in that quarter. Regional offices must make certain these grantees' Title VI programs (and all other programs) are current and approved; if not, grantees must submit programs for review and approval before their pending grant applications are approved.[649]

Application reviews consider all the information provided by the applicants,[650] findings and recommendations from previous reviews, including corrective actions taken by the applicants, and other information, including the applicants' Title VI self-assessments.[651]

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[642] Schruth letter, attachment, p. 3.

[643] 49 C.F.R. Part 21 (1994).

[644] Urban Mass Transit Administration, "Title VI Program Guidelines for Urban Mass Transportation Administration Recipients," UMTA C 4702.1, May 26, 1988, (hereafter cited as DOT/FTA Title VI Guidelines).

[645] Ibid.

[646] Ibid.

[647] DOT/FTA FY 1994 Implementation Plan, p. 11.

[648] Ibid.

[649] Schruth letter, attachment, p. 2.

[650] The information applicants must submit is discussed below, pp. 577–78.

The FTA conducted 712 preaward reviews covering each grant applicant in fiscal year 1992.[652] In fiscal year 1993, the FTA conducted 847 desk-audit reviews and 4 onsite reviews of applicants.[653] It found that 33 of the applicants were in noncompliance, but it granted assistance to all of the applicants on condition that they take corrective action.[654]

### Postaward Desk-Audit and Onsite Compliance Reviews

The FTA's Title VI guidelines indicate that the FTA conducts "post-approval" reviews of its recipients as a part of its ongoing monitoring responsibilities.[655] It must perform these reviews at least once every 3 years.[656]

According to FTA/OCR's Acting Director:

> The grantee compliance universe is "staggered" so that civil rights officers review only one-third of their regions' grantees in a given year. In addition, many FTA grant recipients, particularly the largest, continually file applications for FTA funding. These applications afford regional officers the opportunity to determine if recipients' civil rights programs are up-to-date and approved. There is one other means of FTA monitoring civil rights. By law, FTA must conduct "triennial reviews" to assure that all agencies receiving Section 9 funds meet all statutory requirements, including civil rights. Such reviews have assisted in identifying unreviewed programs or concerns not previously addressed.[657]

An FTA onsite compliance review must include an inspection of all materials pertaining to implementation of Title VI and verification that all service standards are being implemented consistent with Title VI.[658] In performing reviews, the FTA confirms whether the State and local metropolitan planning organizations' planning processes consider the transit needs of minority communities, determines the type of monitoring and reporting mechanisms States have established to assure that subrecipients' service is nondiscriminatory, and determines whether a process has been established to handle Title VI complaints alleging discrimination in services/benefits.[659]

The FTA conducted 146 postaward reviews in fiscal year 1992. FTA/OCR's Acting Director estimated that the number of postaward reviews for both fiscal year 1993 and fiscal year 1994 would exceed the 1992 total.[660] In fact, in fiscal year 1993, the FTA completed 241 reviews.[661] Most of these reviews, 226, were desk-audit reviews.[662] As of August 17, 1994, it had conducted just two onsite compliance reviews during fiscal year 1994, with one additional review scheduled for late in the fiscal year.[663]

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[651] DOT/FTA Title VI Guidelines, pp. V–1.

[652] Schruth letter, attachment, p. 5.

[653] DOT/FTA FY 1994 Implementation Plan, Workload and Performance Data, p. 18.

[654] Ibid.

[655] DOT/FTA Title VI Guidelines, p. V–1.

[656] Ibid.

[657] Schruth letter, attachment, p. 4.

[658] DOT/FTA Title VI Guidelines, p. V–2.

[659] Ibid.

[660] Schruth letter, attachment, p. 6.

[661] DOT/FTA FY 1994 Implementation Plan, Workload and Performance Data, p. 20.

[662] Ibid.

[663] Schruth letter, attachment, p. 6.

The FTA indicated that FTA/OCR plans to emphasize onsite compliance reviews to determine the extent to which FTA grant recipients are implementing their civil rights programs.[664] A contractor experienced in conducting civil rights reviews will perform some of these reviews. Prior to conducting the reviews, the contractor was to develop "how to" manuals for each program area (Title VI, equal employment opportunity, Americans with Disabilities Act, and disadvantaged business enterprise).[665] These manuals have been completed.[666] The Commission was not provided with these documents and so cannot evaluate their quality. However, it often is the case that contractors do not have sufficient experience with Title VI to conduct adequate Title VI compliance reviews.

### Complaint Investigations

FTA/OCR is responsible for investigating Title VI complaints, but it must forward all complaints to the Office of the Secretary's OCR for review.[667] To streamline the complaint processing process, FTA has requested that the Office of the Secretary's OCR delegate its complaint authority to FTA/OCR. However, this request has been denied.[668]

In fiscal year 1992, the FTA received 39 civil rights complaints relating to its federally assisted programs and the Americans with Disabilities Act of 1990.[669] Of these, 1 was a Title VI complaint, and 10 alleged violations of more than one statute, possibly including Title VI. The same year, the FTA closed 5 complaints administratively, referred 10 to another agency, resolved 2 before investigation, and reached findings of compliance for 3 and a finding of noncompliance for 1 complaint. The FTA began and ended the year with a backlog of 39 complaints.[670]

The FTA received 74 complaints in fiscal year 1993. Only one was related to Title VI.[671] The FTA did not indicate whether it addressed or resolved the complaint. The dearth of Title VI complaint indicates that the FTA may not be performing adequate outreach and education to inform the public of its rights under Title VI with respect to FTA-funded programs.

### Deficiencies, Remedies, and Sanctions

When a regional office finds a recipient in probable noncompliance, the regional office attempts to conciliate. However, before issuing a noncompliance determination, the regional office must consult with FTA/OCR.[672] The FTA did not take any legal or administrative actions in fiscal year 1993.[673]

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[664] DOT/FTA FY 1994 Implementation Plan, p. 12.

[665] Ibid., pp. 12–13.

[666] Sano interview, p. 1.

[667] DOT/FTA Survey, Q. 25(j), p. 23; DOT/FTA FY 1994 Implementation Plan, p. 11.

[668] DOT/FTA FY 1994 Implementation Plan, p. 11. The Acting Director of FTA/OCR made a second request which is still pending. Ibid.

[669] U.S. Department of Transportation, Federal Transit Administration, "Fiscal Year 1993 Civil Rights Implementation Plan, Workload and Performance Data, p. 13 (hereafter cited as DOT/FTA FY 1993 Implementation Plan).

[670] Ibid., pp. 13–14.

[671] DOT/FTA FY 1994 Implementation Plan, Workload and Performance Data, p. 12.

[672] Ibid., p. 11.

[673] Ibid., p. 13.

## Outreach, Education, and Technical Assistance

FTA/OCR conducts virtually no outreach and education, with the probable result that the intended beneficiaries of the FTA's federally funded programs are unaware of their rights under Title VI or where and how to file Title VI complaints. According to the Acting Director of FTA/OCR, "in the past five years, the chief means of disseminating information relating to FTA's Title VI program has been through numerous conferences, workshops, seminars, meeting, etc."[674] She indicated, however, that these activities did not focus primarily on Title VI.[675]

The Acting Director of FTA/OCR indicated that the FTA believes that "extremely limited resources should be applied to conducting Title VI reviews or investigating Title VI complaints rather than undertaking outreach wit the general public which undoubtedly has benefits, but they are difficult to quantify."[676] He also claimed that it would be difficult to implement an outreach and education program: "For example, which communities and which groups would receive such outreach, what would be the medium for dissemination of information, etc.?"[677] However, Title VI outreach and education could easily be conducted through the same media FTA/OCR uses for other civil rights statutes. He added that outreach and education is not needed, because "in most communities, particularly in large urbanized areas, . . . . public mass transit is provided on a non-discriminatory basis."[678] However, this view appears to overlook the possibility of adverse impact discrimination in decisions about location of bus, subway, and train routes and quality and frequency of service.

The FTA provides technical assistance to State and local agency staff upon request.[679] According to the Acting Director of FTA/OCR, the FTA initiates technical assistance when it is apparent that a grantee has a misconception or misunderstanding of civil rights requirements, as evidenced in programs, phone calls, or letters. It provides assistance to FTA grant recipients or new grant recipients usually by telephone.[680]

In 1993 technical assistance provided by the FTA included: 1) clarification and interpretation of regulations; 2) statistical information and data; 3) guidance on developing content of required documentation, such as maps and narratives; 4) recommendations for developing procedures to prevent disparate treatment in transit service and benefits; 5) answers to questions, usually inquiries by telephone; and 6) training through workshops, regional seminars, and national conferences.[681]

## Monitoring State Title VI Enforcement

The FTA requires State agencies receiving FTA funds to have Title VI programs to ensure that subrecipients are in compliance with Title VI.[682] States must appoint a Title VI liaison officer, who is responsible for developing the State's Title VI program that States must submit to the FTA, as well as for monitoring the State's federally assisted activities to ensure that they are in compliance with Title VI.[683] According to the Acting Director of FTA/OCR, since the State Title VI liaison officers are chosen and appointed by the States, the FTA does not involve itself in whether they are full-time or collateral-duty personnel.[684]

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[674] Ibid.

[675] Ibid.

[676] Sano letter, p. 2.

[677] Ibid.

[678] Ibid.

[679] DOT/FTA Survey, Q. 53, pp. 44–45.

[680] Schruth letter, attachment, p. 7.

[681] DOT/FTA FY 1994 Implementation Plan, p. 14.

[682] DOT/FTA Title VI Guidelines, p. II–2.

[683] Schruth letter, attachment, p. 2.

The Acting Director of FTA/OCR indicated that for the most part FTA monitoring of States' Title VI programs is limited to reviewing required documents submitted to FTA/OCR by the States' Title VI liaison officers. She reported that, "on a few occasions" FTA/OCR had conducted compliance reviews of State agencies.[685] She attributed the infrequency of these reviews to a lack of resources and the FTA's emphasis on monitoring the civil rights compliance of public transit authorities.[686]

Thus, FTA/OCR's monitoring of its State recipients is minimal, at best.

## Staff Training

Civil rights training for staff and recipients is the responsibility of FTA/OCR.[687] In fiscal year 1993, the FTA offered its headquarters and regional civil rights staff training on civil rights statutes, regulations, and case law. In two regions, a contractor provided training on the administration's civil rights programs and requirements to grant recipients and FTA regional staff.[688]

## Delegation Agreement

The FTA has a memorandum of understanding with the Federal Highway Administration. Under it, the Federal Highway Administration is the lead agency receiving and reviewing the equal employment opportunity and disadvantaged business enterprise programs of the State departments of transportation and other State agencies.[689] The FTA and the Federal Highway Administration formed the agreement to ensure that a State transportation agency does not have to implement two equal employment opportunity or disadvantaged business enterprise programs.[690]

## Reporting Requirements, Data Collection, and Analysis

FTA/OCR data collection and analysis capabilities are comprehensive. They are more than sufficient to permit the FTA to make thorough use of desk-audit preaward and postaward reviews as part of its Title VI enforcement process.

The FTA Title VI guidelines place very specific reporting requirements on FTA recipients. All FTA applicants must submit certain basic information, including:

- a list of any active lawsuits or complaints against the applicant;[691]
- a description of all pending applications for financial assistance, and all financial assistance currently provided by other Federal agencies;[692]
- a summary of all civil rights compliance review activities conducted in the last 3 years;[693]
- a signed assurance that all of the records and other information required under the guidelines have been or will be compiled and maintained by the applicant, recipient, or subrecipient. In the case of State-administered

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[684] Ibid., pp. 2–3.

[685] Ibid., p. 3.

[686] Ibid.

[687] DOT/FTA Survey, Q. 25(i), p. 23.

[688] DOT/FTA FY 1994 Implementation Plan, p. 21.

[689] Ibid., p. 15.

[690] Ibid.

[691] DOT/FTA Title VI Guidelines, p. II–1.

[692] Ibid.

[693] Ibid., p. III–2.

programs, this assurance should be provided by the State and all subrecipients ;[694]
- a signed standard DOT Title VI Assurance;[695] and
- for construction projects, a fixed-facility impact analysis to assess the effects on minority communities.[696]

The FTA also requires additional information from recipients of selected FTA programs, including public transit providers serving areas with a population of more than 200,000 persons;[697] designated metropolitan planning organizations;[698] State agencies administering transit programs for the elderly and the handicapped;[699] State agencies administering transit programs for rural and small urban areas;[700] applicants for research, development, and demonstration project funds;[701] and applicants for grants for technical and professional training fellowships.[702] For instance, public transit providers applying for FTA funds must provide:

- demographic service profile maps, overlays, and charts;
- information on their service standards and policies;
- assessment of compliance by their grantees;
- information on changes in service features;
- methods of information dissemination to the minority community;
- minority representation on decisionmaking bodies; and
- multilingual facilities.[703]

FTA/OCR reviews data submitted by recipients to determine who, by race, color, and national origin, a recipient's transit system serves; and to determine whether the recipient has different standards of service for minority and nonminority areas. For instance, FTA/OCR analyzes a transit agency's vehicle assessment records to determine the number and average age of vehicles, such as buses, assigned to minority and nonminority routes; conducts a load factor analysis to determine whether there is a greater degree of overcrowding in minority than in nonminority areas; and performs an accessibility analysis to determine whether minority transit users have the same opportunities to reach desired locations as nonminority users.[704] FTA/OCR uses a database system to track various types of program data, such as overall civil rights compliance status of grantees.[705]

## Civil Rights Implementation Plans

In response to the Commission's request for all Civil Rights Implementation Plans and supporting workload and performance data documents, the FTA replied:

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[694] Ibid.

[695] Ibid., p. III–2.

[696] Ibid.

[697] Ibid., pp. III–3—III–9.

[698] Ibid., pp. III–9—III–10.

[699] Ibid., pp. III–10—III–11.

[700] Ibid., pp. III–11—III–12.

[701] Ibid., p. III–12.

[702] Ibid., p. III–13.

[703] Ibid., pp. III–3—III–9.

[704] DOT/FTA FY 1993 Implementation Plan, pp. 14–15.

[705] DOT/FTA FY 1994 Implementation Plan, p. 16.

UMTA/FTA implementation plans from prior fiscal years are not available since our office has thrown out these plans because of the tremendous amount of file space they occupied. Therefore, FTA is enclosing the most current agency implementation plan (FY 1993) submitted to the Department of Justice. The FTA did not provide a base year implementation plan for FY 1990. Therefore, the FY 1993 FTA implementation plan describes our Agency's various civil rights programs that took place in FY 1992, as well as projects in FY 1993.[706]

The Commission reviewed FTA's Civil Rights Implementation Plans for fiscal years 1993 and 1994.[707] The plans follow the general format proscribed by the Department of Justice.[708] Both plans provide an overview of the FTA's civil rights enforcement program.[709] The overview is particularly thorough in listing the FTA's civil rights authorities[710] and describing the FTA's financially assisted programs.[711] Compared to other agencies, this narrative section is comprehensive, but it is insufficient to serve as a basis for Department of Justice oversight of the FTA's civil rights implementation and enforcement program.[712]

Both plans list four long-range goals, two of which have some bearing on Title VI:

> 1) To implement a more cost-effective and efficient overall FTA civil rights program resulting in less burdensome requirements on grant recipients while maintaining the integrity of the program.
>
> 2) To assure that FTA programs and projects . . . address the social and economic needs and concerns of protected groups . . . through improved transit service . . . and increased opportunities in the areas of employment and contracting.[713]

Related to the long-range goals, the plans list seven major objectives:

> 1) To revise and issue, as appropriate, guidelines and procedures for recipients and Agency staff that assure uniform interpretation and implementation of program requirements;
>
> 2) To provide periodic training for Agency staff, as well as grant recipients and contractors, after the issuance of new guidance and regulations, to assure uniform interpretation;
>
> 3) To conduct onsite compliance reviews of grant recipients in coordination with FTA's Triennial Review process or of those recipients which FTA determines may have civil rights concerns or patterns and practices of discrimination;
>
> 4) To implement a program of preventive civil rights that serves to reduce the number of civil rights complaints significantly;
>
> 5) To provide ongoing technical assistance and support to FTA Headquarters and regional offices, grant recipients and contractors to assure that they understand all requirements and that they implement programs;

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[706] DOT/FTA Survey, Appendix 3, p. 4.

[707] DOT/FTA FY 1993 Implementation Plan; DOT/FTA FY 1994 Implementation Plan.

[708] The Department of Justice has indicated that this is one purpose of Civil Rights Implementation Plans. *See* U.S. Department of Justice, "Guideline for Agency Implementation Plans Required by Executive Order 12250, 'Leadership and Coordination of Nondiscrimination Laws,'" (no date), p. 4 (hereafter cited as DOJ Guideline for Agency Implementation Plans).

[709] *See* DOT/FTA FY 1994 Implementation Plan, pp. 1–21.

[710] *See* ibid., pp. 2–4.

[711] *See* ibid., pp. 5–6.

[712] DOJ Guideline for Agency Implementation Plans, p. 3.

[713] *See* DOT/FTA FY 1994 Implementation Plan, pp. 9–10.

6) To inform and educate the DBE community and community organizations, among others, of FTA's programs, including those administered by FAA/OCR such as the Human Resources Program; and

7) To develop new and creative human resource projects funded under Section 20 of the Federal Transit Act that assist minorities and women to advance in mass transportation and that assist grant recipients in attaining civil rights goals and objectives.[714]

The 1994 Civil Rights Implementation Plan also lists several more specific long-range objectives according to functional areas, with corresponding activities and goals, but no timeframes for accomplishing them.[715] The goals and objectives section of the plans do not conform precisely to Department of Justice requirements. Although some of the goals are specific, the lack of timeframes for completing them indicates that the FTA does not used the plans as an agency planning document.[716]

## Findings and Recommendations

### Organization, Budget, Staffing, and Workload

#### Organization

**Finding:** The Federal Transit Administration (FTA) has a sound organizational structure in that all regional civil rights staff report to the Director of FTA's Office of Civil Rights (FTA/OCR) and the Director of FTA/OCR reports directly to the FTA's Administrator. However, FTA/OCR does not have a separate unit with separate supervisory staff responsible for external civil rights enforcement. Furthermore, none of FTA/OCR's staff, either in headquarters or the regions, specializes in external civil rights enforcement.[717]

**Recommendation:** FTA/OCR should create an internal organizational structure that insulates Title VI enforcement from other civil rights activities. Thus, FTA/OCR should be organized into separate units with separate supervisory staff for external civil rights (including in Title VI), internal civil rights, and other civil rights areas. Furthermore, FTA/OCR staff should assign specific staff members to specific civil rights areas, rather than having a staff of generalists.

#### Budget, Staffing, and Workload

**Finding:** FTA/OCR does not have the capability of tracking its civil rights expenditures on the various civil rights statutes for which it is responsible and on various civil rights activities, such as complaint processing, compliance reviews, and technical assistance. Thus, FTA/OCR cannot engage in sound management planning.[718]

**Recommendation:** FTA/OCR should develop and implement a management information system that permits it to track its expenditures and workload for the various civil rights statutes and activities for which it is responsible. FTA/OCR should use this management information system in the preparation of an annual civil rights enforcement plan. The civil rights enforcement plan should contain specific goals and objectives, with specific timeframes for accomplishing them, and assign specific resources to carry them out. Furthermore, FTA/OCR should use the management information system to analyze its workload in comparison to its resources to determine whether it can reallocate resources to improve its civil rights enforcement or whether additional resources are necessary. FTA/OCR should use the management information system to help it prepare its budget submissions.

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[714] *See* ibid., pp. 10–11.

[715] Ibid., pp. 32–43.

[716] This is one of the Department of Justice's purposes for Civil Rights Implementation Plans. DOJ Guideline on Agency Implementation Plans, p. 3.

[717] *See* pp. 569–71.

[718] *See* pp. 571–72.

**Finding:** FTA/OCR's staffing has decreased over time, but its workload has increased. Furthermore, the staff cuts have affected FTA/OCR's regional staff, who perform most of the FTA's day-to-day Title VI enforcement activities, more than the headquarters staff. As of fiscal year 1994, only one-half of the FTA regions has regional civil rights staff.[719]

**Recommendation:** FTA should use the management information system recommended above to provide the necessary information to support a formal request for additional staff resources. However, in the interim, FTA/OCR should consider whether reallocating staff from its headquarters office to its regional offices would enhance its ability to fulfill its civil rights mission.

## Regulations, Guidelines, Policies, and Procedures

**Finding:** The FTA has a comprehensive Title VI guideline that lists the FTA's federally assisted programs and provides adequate guidance and instructions to recipients on their Title VI compliance responsibilities, including their data collection and analysis responsibilities, and their responsibility to conduct public outreach and education. However, the FTA has not issued needed Title VI policies and does not have a procedures manual that lays out the procedures for complaint investigations and compliance reviews.[720]

**Recommendation:** FTA/OCR should issue Title VI policy statements to enhance and update its Title VI guideline. For instance, FTA/OCR should issue policy statements on the implications of the Civil Rights Restoration Act and the Intermodal Surface Transportation Act, similar to those issued by the Federal Highway Administration. Furthermore, FTA/OCR should develop and issue a procedures manual detailing internal procedures for handling complaint investigations, conducting preaward and postaward reviews, and monitoring State recipients. In addition to detailing the process for conducting investigations, the procedures should specify what information should be considered in reaching determinations of compliance or noncompliance, give examples of noncompliance that are specific to FTA programs, and give instructions for selecting recipients and States for review.

## Process of Title VI Enforcement

### Postaward Reviews

**Finding:** Although FTA/OCR's regional staff conduct a large number of postaward reviews each year and attempt to review each recipient at least once every 3 years, most of these postaward reviews are desk-audit reviews. FTA plans to increase the number of onsite reviews it conducts through the use of a contractor. Although it is essential for FTA/OCR to increase the number of onsite compliance reviews, using a contractor to conduct these reviews is problematic. Most contractors do not have sufficient experience with Title VI to conduct adequate Title VI compliance reviews.[721]

**Recommendation:** FTA/OCR should select its contractor with extreme care, review and evaluate the manuals prepared by the contractor closely, and monitor closely the contractor's performance of onsite compliance reviews. FTA/OCR staff should accompany the contractor on several reviews.

### Outreach and Education

**Finding:** The FTA conducts almost no outreach and education. As a result, intended beneficiaries and affected communities are not made aware of their rights under Title VI. An indication of this lack of awareness is that the FTA receives almost no Title VI complaints.[722]

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[719] *See* pp. 572–73.

[720] *See* p. 573.

[721] *See* p. 575.

[722] *See* p. 576.

**Recommendation:** FTA/OCR should develop and implement a strategic plan to provide outreach and education on Title VI. The plan should specify clearly the roles of FTA/OCR headquarters and regional staff as well as the roles of recipients in providing outreach and education. The FTA/OCR headquarters staff should develop informational materials, brochures, and conference materials for use by regional staff and recipients. FTA/OCR staff should conduct Title VI outreach and education in workshops and conferences attended by recipients, intended beneficiaries, and members of affected communities.

### Technical Assistance

**Finding:** The FTA does not provide adequate technical assistance on Title VI. Thus, it provides technical assistance on request only, usually over the telephone.[723]

**Recommendation:** FTA/OCR should undertake to provide technical assistance on Title VI proactively, not just upon request. FTA/OCR should incorporate technical assistance as part of its preaward and postaward compliance reviews. In addition, FTA/OCR should provide technical assistance on a regular basis to all recipients to address complicated or emerging Title VI issues.

## Oversight of State Title VI Enforcement

**Finding:** The FTA delegates considerable responsibilities to State recipients to ensure Title VI compliance of their subrecipients. However, the FTA does not oversee the States' Title VI compliance programs.[724]

**Recommendation:** FTA/OCR must devote the necessary resources to oversee effectively the States' Title VI compliance programs. In addition to reviewing the documents submitted to the FTA by the States' Title VI liaison officers, FTA/OCR should conduct onsite reviews of the States' programs to gain a deeper understanding of them, to ensure the accuracy of the documents submitted, and to provide technical assistance to the States.

## Reporting Requirements, Data Collection, and Data Analysis

**Finding:** The FTA's data collection and analysis system is comprehensive. The FTA guidelines require recipients to report all of the information necessary to conduct an effective desk-audit analysis of their compliance with Title VI. FTA/OCR reviews and analyses these data systematically and thoroughly.[725]

**Recommendation:** Other DOT modal administrations should use the FTA's data collection and analysis system as a model for developing their own systems.

## Civil Rights Implementation Plans

**Finding:** The FTA's Civil Rights Implementation Plans do not fulfill the purposes envisioned by the U.S. Department of Justice in its "Guideline for Agency Implementation Plans Required by Executive Order 12,250, 'Leadership and Coordination on Nondiscrimination Laws.'" Although they have an unusually thorough section describing the civil rights authorities for which the FTA is responsible and the FTA's federally assisted programs, they do not provide sufficient information for the Department of Justice or the public to gain an understanding of the FRA's civil rights enforcement program. Furthermore, the goals and objectives in the plans do not have timeframes for completing them. Thus, FTA/OCR is not using the plan as a management tool.[726]

**Recommendation:** The FTA should develop its Civil Rights Implementation Plans in conformance with the Department of Justice guideline. In particular, should develop specific goals and objectives, with measures and timeframes for accomplishing them, for each of the parts of the Title VI implementation process. Finally, the FTA should use the plans as a management tool. Thus, the plans should be sufficiently specific and detailed to serve as a civil rights enforcement plan.

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[723] *See* p. 576.

[724] *See* pp. 576–77.

[725] *See* pp. 577–78.

[726] *See* pp. 579–80.

## National Highway Traffic Safety Administration

The National Highway Traffic Safety Administration (NHTSA) was established to carry out safety programs under the National Traffic and Motor Vehicle Safety Act of 1966[727] and the Highway Safety Act of 1966.[728]

NHTSA carries out its responsibilities on three fronts:

1) NHTSA is responsible for reducing deaths, injuries, and economic losses resulting from motor vehicle crashes;

2) NHTSA investigates safety defects in motor vehicles; sets and enforces fuel economy standards; helps States and local communities reduce the threat of drunk drivers; promotes the use of safety belts, child safety seats, and air bags; investigates odometer fraud; establishes and enforces vehicle antitheft regulation; and provides consumer information on motor vehicle safety topics; and

3) NHTSA conducts research on driver behavior and traffic safety.[729]

In fiscal year 1993, NHTSA awarded more than $155 million in Federal financial assistance to a total of 57 State recipients.[730]

### Federally Assisted Programs

NHTSA administers three federally assisted programs:

*State and community highway safety grants*, also known as section 402 grants, seek to provide a coordinated national highway safety program to reduce traffic accidents, deaths, injuries, and property damage.[731] This program is the largest of NHTSA's federally assisted programs. Assistance is in the form of formula grants to the States, based on their population and road mileage. At least 40 percent of the funds must be given to subdivisions of the States to administer.[732]

*Alcohol traffic safety and drunk driving prevention incentive grants* encourage States to adopt effective programs to reduce the number of crashes resulting from persons driving under the influence of alcohol and other controlled substances.[733] Assistance is in the form of project grants to State highway safety agencies.[734]

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[727] Pub. L. No. 89–563, 80 Stat. 718 (codified as amended at 15 U.S.C. §§ 1381, 1391–1426, 1431 (1988 & Supp. V 1993)).

[728] Pub. L. No. 89–564, 80 Stat. 731 (codified as amended in scattered sections of U.S.C.). *See* 23 U.S.C. §§ 401–410 (1988 & Supp. V 1993)(Secretary's authority to create and administer highway safety programs). *See also* U.S. Department of Transportation, National Highway Traffic Safety Administration, "Fiscal Year 1994–97 Civil Rights Implementation Plan," p. 1 (hereafter cited as DOT/NHTSA FY 1994 Implementation Plan).

[729] DOT/NHTSA FY 1994 Implementation Plan, p. 1.

[730] Ibid., FY 1993 Workload and Performance Data, p. 11.

[731] Office of Management and Budget and U.S. General Services Administration, *1993 Catalog of Federal Domestic Assistance* (Superintendent of Documents: Washington, D.C., 1993), vol. 1, p. 470 (hereafter cited as Catalog of Federal Domestic Assistance).

[732] Ibid.; DOT/NHTSA FY 1994 Implementation Plan, p. 4.

[733] Catalog of Federal Domestic Assistance, p. 471.

[734] Ibid.

*Motorcycle helmets and safety belt incentive grants* are designed to broaden State efforts to achieve higher safety belt use and enact motorcycle helmet and safety belt use laws.[735] Assistance is in the form of project grants to the States.[736]

## Organization, Budget, Staffing, and Workload

### Organization and Responsibilities

Enforcement of Title VI and other civil rights statutes at NHTSA is the responsibility of the Office of Civil Rights (NHTSA/OCR).[737] NHTSA/OCR is headed by a Director who reports to the Deputy Administrator of NHTSA.[738] NHTSA/OCR's staff all operate out of the Washington, D.C., headquarters office. NHTSA does not have civil rights staff in its regional offices.[739]

NHTSA/OCR has overall responsibility for NHTSA's civil rights and equal employment opportunity activities.[740] It is responsible for ensuring that grant recipients comply with pertinent civil rights statutes, Executive orders, and administrative regulations.[741]

The organizational structure of NHTSA's civil rights enforcement function is adequate for an agency with a small civil rights enforcement program. However, that NHTSA/OCR's Director does not report directly to the agency Administrator is likely to impede NHTSA/OCR's ability to garner attention and resources for civil rights enforcement within NHTSA.

### Budget, Staffing, and Workload

NHTSA/OCR's funding has increased in nominal terms over time, but its expenditures on external civil rights enforcement have not. In fiscal year 1993, NHTSA/OCR devoted $35,000 of its total civil rights budget of $238,000 to external civil rights activities.[742] This amount was $15,000, or 30 percent, below its external civil rights expenditures in 1981 of $50,000 and $8,500, or 20 percent, below its external civil rights expenditures in 1976 of $43,000.[743] Although the Director of NHTSA/OCR has requested from the NHTSA Administrator an additional $6,000 to $10,000 for each of the past 3 fiscal years to conduct compliance reviews, the funds were not approved.[744]

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[735] Ibid., p. 472.

[736] Ibid.

[737] *See* U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Transportation, National Highway Traffic Safety Administration, Q. 20, p. 16 (hereafter cited as DOT/NHTSA Survey). The National Highway Traffic Safety Administration's Office of Civil Rights is responsible for a variety of Federal statutes, presidential executive orders and departmental administrative regulations including: Title IX of the Education Amendments Act of 1972, 20 U.S.C. §§ 1681–1688 (1988); the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12,101–12,213 (Supp. V 1993); the Age Discrimination Act of 1975, 42 U.S.C. §§ 6101–6107 (1988); Title 23 U.S.C. § 324 (1988); Executive Order 11,625, codified at 3 C.F.R. 616 (1971–1975 Compilation); Executive Order 12,138, codified at 3 C.F.R. 399 (1980); and Executive Order 12,677, codified at 3 C.F.R. 222 (1990); and 49 C.F.R. Parts 21, 23, 27, 28, and 37 (1994).

[738] DOT/NHTSA Survey, Q. 20, p. 16.

[739] DOT/NHTSA FY 1994 Implementation Plan, p. 5; DOT/NHTSA Survey, Q. 37, p. 27.

[740] *See* U.S. Department of Transportation, National Highway Traffic Safety Administration, NHTSA Order 110–8A, "Office of Civil Rights, Functions," p. I–7.

[741] DOT/NHTSA FY 1994 Implementation Plan, p. 2.

[742] DOT/NHTSA Survey, Q. 33, p. 23.

[743] Ibid.

[744] George B. Quick, Director, Office of Civil Rights, National Highway Traffic Safety Administration, U.S. Department of Transportation, letter to Frederick D. Isler, Acting Assistant Staff Director for Civil Rights Evaluation, U.S. Commission on Civil Rights, Apr. 20, 1995, p. 1 (hereafter cited as Quick letter).

From 1982 to 1994, NHTSA/OCR had only one FTE assigned to Title VI and other external civil rights activities.[745] As of 1993, the office as a whole had five FTEs.[746] NHTSA/OCR has trained all of its employees to conduct both internal and external civil rights duties. At present, NHTSA/OCR has two employees and one employee detailed from another office assigned to Title VI activities.[747]

During the 1980s, NHTSA/OCR's workload increased due to the passage of the Americans with Disabilities Act of 1990.[748] The act's regulations assign "designated agency" responsibilities to the administration.[749] NHTSA particularly is affected by the nondiscrimination prohibitions on the basis of disability applying to State traffic management, automobile licensing, and driver licensing provisions.[750]

NHTSA indicated that the reductions in funding have seriously undermined NHTSA/OCR's ability to fulfill its civil rights responsibilities:

> NHTSA's Title VI compliance program has been held essentially in abeyance since deregulation of the 1980s. Staff resources (9 FTEs), contract monies for program support, and travel funds necessary for conducting technical assistance, compliance reviews and complaint investigations were reduced to well below the funding levels of the 1970s. The result has been an almost total reduction of the visibility or presence of the office of Civil Rights' Title VI compliance program within the agency's ten regional offices or to the 57 primary recipients of funds under the State Community Highway Safety Program. Consequently, the proactive "systemic" initiatives of the late 1970s have been essentially nullified.[751]

Given that its workload is increasing, it is not possible for two or three staff members to carry out NHTSA's entire external civil rights enforcement program. As a result, NHTSA is conducting few Title VI enforcement activities. Until NHTSA assigns more staff and resources to external civil rights enforcement, NHTSA's Title VI enforcement will continue to be inadequate.

### DOT Reorganization

DOT's reorganization,[752] as originally proposed, would have abolished NHTSA/OCR.[753] It would have reassigned NHTSA/OCR staff to the Office of the Secretary's OCR[754] and transferred NHTSA's affirmative action responsibilities to NHTSA's Office of Personnel. As a result, the same office would have overseen affirmative action and labor relations.[755] Such an organizational structure would have been problematic because it would have created potential conflicts of interest.

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[745] DOT/NHTSA FY 1994 Implementation Plan, p. 6. In 1976, NHTSA had 2 FTEs assigned to Title VI. *See* DOT/NHTSA Survey, Q. 36, p. 27.

[746] Ibid. In 1976, NHTSA's civil rights staff consisted of 7 FTEs. DOT/NHTSA Survey, Q. 35, p. 26. Travel includes training, conferences, and conventions.

[747] Quick letter, p. 1.

[748] 42 U.S.C. §§ 12,101–12,213. DOT/NHTSA Survey, Q. 27, p. 20.

[749] Ibid.

[750] Ibid.

[751] DOT/NHTSA Survey, Q. 82(b), p. 54.

[752] This discussion pertains to DOT's original proposed reorganization. Since the reorganization was not approved in full by Congress, it is only being partially implemented.

[753] George B. Quick, Director, Office of Civil Rights, National Highway Traffic Safety Administration, U.S. Department of Transportation, interview in Washington, D.C., Sept. 13, 1994, p. 2.

[754] Ibid., p. 2.

[755] Ibid.

## Regulations, Guidelines, Policies, and Procedures

NHTSA operates under DOT's Title VI regulations[756] and DOT Order 1000.12.[757] NHTSA also uses DOT's compliance manual, which outlines procedures for conducting Title VI compliance reviews.[758] Other than Title VI complaint investigation procedures,[759] however, NHTSA has not developed guidelines, policies, or procedures specifically tailored to its federally assisted programs.

## Process of Title VI Enforcement

Apart from reviewing documents submitted by State recipients, NHTSA conducts virtually no Title VI enforcement activities. Thus, it is not adequately meeting its responsibility to ensure that its recipients are in compliance with Title VI.

### Preaward Reviews

Since 1976, NHTSA has made 57 grant awards each year to State agencies.[760] However, NHTSA has not conducted any preaward reviews since 1981.[761] NHTSA attributed the lack of preaward activity to the Reagan administration's deregulation initiatives.[762]

### Postaward Desk-Audit and Onsite Compliance Reviews

There is no evidence that NHTSA has conducted any postaward desk-audit reviews or onsite compliance reviews in the last 12 years.[763] In fiscal year 1993 NHTSA awarded 57 grants and did not conduct any postaward reviews to evaluate or detect any possible discriminatory actions by recipients.[764]

NHTSA indicated that it plans to begin conducting compliance reviews, on a pilot basis, in fiscal year 1995, if travel funds permit.[765] However, as indicated above, NHTSA/OCR has not been granted the necessary additional funds.[766]

### Complaint Investigations

Although NHTSA receives a number of American with Disabilities Act complaints, it had not received any Title VI complaints from fiscal year 1993 to April 1995.[767]

### Deficiencies, Remedies, and Sanctions

Since NHTSA does not conduct complaint investigations or compliance reviews, NHTSA identified no deficiencies and remedies in its survey response.[768]

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[756] 49 C.F.R. Part 21 (1994).

[757] U.S. Department of Transportation, Order 1000.12, "Implementation of the Department of Transportation Title VI Program," Jan. 19, 1977.

[758] Quick letter, p. 2.

[759] Ibid.

[760] DOT/NHTSA Survey, Q. 41(b), p. 31.

[761] Ibid., p. 33. *See also* DOT/NHTSA FY 1994 Implementation Plan, Workload and Performance Data, p. 19, which indicates that DOT/NHTSA did not conduct any preaward reviews in fiscal year 1993.

[762] Ibid., Q. 42, p. 33.

[763] To the survey question requesting such information, the National Highway Traffic Safety Administration responded "N/A." *See* ibid., Q. 45, p. 35. In 1976, NHTSA conducted 2 onsite compliance reviews. DOT/NHTSA Survey, Q. 68, p. 44.

[764] DOT/NHTSA FY 1994 Implementation Plan, Workload and Performance Data, p. 21.

[765] Ibid., p. 9.

[766] *See* discussion, p. 583.

[767] Quick letter, pp. 3–4. *See also* DOT/NHTSA FY 1994 Implementation Plan, Workload and Performance Data, p. 13.

[768] DOT/NHTSA Survey, Q. 67, p. 43.

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### Education, Outreach, and Technical Assistance

NHTSA has not conducted education and outreach for recipients, the general public, or State and local agencies.[769] One of NHTSA/OCR's stated goals for the period 1994 through 1997 is to work with Hispanic organizations to develop workshops, media announcements, and other mechanisms to ensure that Hispanics receive highway safety messages.[770] Recently, NHTSA has initiated several outreach and education projects. NHTSA has initiated partnerships with ethnic and cultural organizations serving the needs of Hispanics, African Americans, and Native Americans.[771] NHTSA also is working to publish a resource listing of available materials for diverse populations.[772]

NHTSA does not provide technical assistance to State recipients.[773] Furthermore, the most recent Title VI and related civil rights compliance training provided to recipients took place in 1980.[774] However, NHTSA has worked to assist recipients in preparing project information relative to diversity populations.[775]

### Monitoring State Title VI Enforcement

All of NHTSA's recipients are State agencies. NHTSA requires each State to assure compliance with Title VI and submit an annual report on its Title VI activities, which NHTSA/OCR evaluates.[776]

NHTSA informed the Commission that the State recipients do not play a Title VI enforcement role, nor do they understand their external civil rights compliance responsibilities:

> State Highway Safety Agencies are the conduits for National Highway Traffic Safety Administration financial aid allocated to State and local highway safety-related agencies (subrecipients). These agencies are generally located organizational within much larger umbrella state departments (e.g. the state of California Business, Transportation, and Housing Agency). However, their role as to Title VI compliance programs, has not transcended being a nominal one. Essentially, their only involvement in ensuring Title VI compliance, is to sign the standard Title VI assurances. . . .
>
> . . . The fifty-seven primary grantees currently play no significant role in ensuring Title VI compliance. For the most part, the state agencies have no understanding of their external civil rights compliance responsibilities, contrary to the dictates of 28 C.F.R. §42.410. Department of Justice regulations require that state agencies receiving continuing Federal financial assistance ". . . establish a Title VI compliance program for itself and other recipients which obtain Federal assistance through it. . . ."[777]

Despite this clear recognition that States are not fulfilling their Title VI compliance responsibilities, NHTSA has not provided substantial technical assistance to State and local agency staff[778] or training seminars for them.[779] Furthermore, NHTSA does not conduct compliance reviews of State recipients.[780] Thus, NHTSA does not fulfill its responsibility to monitor the Title VI compliance of its recipient State agencies.

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[769] *See* ibid., Qs. 46–48, p. 36. NHTSA's fiscal year 1994 Civil Rights Implementation Plan does not discuss outreach and education. *See* DOT/NHTSA FY 1994 Implementation Plan.

[770] DOT/NHTSA FY 1994 Implementation Plan, p. 9.

[771] Quick letter, p. 4.

[772] Ibid., p. 5.

[773] DOT/NHTSA Survey, Q. 53, p. 37. NHTSA's fiscal year 1994 Civil Rights Implementation Plan does not discuss technical assistance. DOT/NHTSA FY 1994 Implementation Plan.

[774] DOT/NHTSA Survey, Q. 52, p. 37.

[775] Quick letter, p. 4.

[776] Quick letter, p. 2.

[777] Ibid.

### Staff Training

The Office of the Secretary's OCR and NHTSA/OCR share the responsibility of providing civil rights training to NHTSA's civil rights staff.[781] However, there is no indication that NHTSA's civil rights staff have received civil rights training in recent years.[782] Since NHTSA has been performing virtually no Title VI enforcement activities for the past decade, its staff has inadequate experience and desperately needs training on Title VI.

### Reporting Requirements, Data Collection, and Analysis

Contrary to the provisions of DOT Order 1000.12,[783] NHTSA does not require recipients to develop a system for establishing base data. The provisions of NHTSA's highway safety program manual that addressed racial and ethnic data were deleted as of September 1, 1993.[784] As a result of this deletion and the deregulation initiatives of the 1980s,[785] it does not appear NHTSA collects any pertinent civil rights data. Recipients do not have to submit annual reports or assess annually minority participation in covered programs.[786] Thus, NHTSA does not have in place a data collection or analysis system that would permit it to conduct adequate preaward or postaward reviews of its recipients if it ever began to do so. However, a NHTSA data group recently has reviewed non-highway-safety data sources for information on injury and fatality patterns by race and ethnicity.[787]

### Civil Rights Implementation Plans

The Commission reviewed NHTSA's fiscal year 1994 Civil Rights Implementation Plan covering the period 1994 to 1997.[788] The plan follows the Department of Justice's proscribed format.[789] The narrative discussion provides an overview of NHTSA's civil rights enforcement program. The plan clearly lays out NHTSA's mission, the civil rights authorities it covers, its federally assisted programs, and the organization, budget, and staffing of NHTSA/OCR.[790] However, the plan provides almost no information on NHTSA's approach to major civil rights functions.[791] Moreover, NHTSA admitted in the progress report section of the plan, that "NHTSA's Office of Civil Rights had minimal involvement in external civil rights compliance activity during fiscal year 1993."[792]

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[778] Ibid., Q. 53, p. 37.

[779] Ibid., Q. 49, p. 37.

[780] *See* discussion above, p. 585.

[781] DOT/NHTSA Survey, Q. 25(i), p. 18.

[782] *See* DOT/NHTSA Survey, Qs. 49, 50, p. 37; *see also* DOT/NHTSA FY 1994 Implementation Plan, which does not include a section on staff development.

[783] DOT Order 1000.12. *See* discussion above for the order's provisions on data collection and reporting requirements.

[784] DOT/NHTSA Survey, Q. 59, p. 39.

[785] Ibid., Q. 62, p. 40.

[786] Ibid., Qs. 62, 61, p. 40.

[787] Quick letter, p. 4.

[788] DOT/NHTSA FY 1994 Implementation Plan.

[789] *See* U.S. Department of Justice, "Guideline for Agency Implementation Plans Required by Executive Order 12,250, 'Leadership and Coordination of Nondiscrimination Laws,'" (no date) (hereafter cited as DOJ Guideline for Agency Implementation Plans).

[790] DOT/NHTSA FY 1994 Implementation Plan, pp. 1–6.

Because NHTSA is doing so little in the area of external civil rights enforcement, the plan fulfills the Department of Justice's purposes of facilitating Department of Justice oversight and serving as an informational tool for the general public.[793] The plan quite clearly demonstrates that NHTSA is not fulfilling its civil rights enforcement responsibilities.

The plan's goals and objectives section is inadequate. It does not conform to the Department of Justice guidelines, which require that the agency have long-range goals, major objectives in each functional area, and short-term objectives for each major objective.[794] NHTSA's plan has a long-range goal to develop and implement a viable civil rights compliance program.[795] The plan does not give any major objectives. Regarding major objectives, it states:

> Traditionally, the effectiveness of civil rights offices/agencies has been measured by the number of complaint investigations, conciliations, and compliance reviews conducted. All Title VI, Title IX, Section 504, and Disadvantaged Business Enterprise-related discrimination complaints are centralized within the Departmental Office of Civil Rights. Complaint investigations have been delegated to this Office (Office of Civil Rights), on a case-by-case basis. The National Highway Traffic Safety Administration's Civil Rights Office primarily aids S–30 in gathering program data and information to facilitate OST's investigation of complaints. This office is not currently responsible for final resolution of complaints regarding allegations of discrimination in federally assisted programs.[796]

NHTSA/OCR's Director indicated that the office did not develop substantial long-range objectives, because "it was not meaningful to establish objectives for an agency that will not exist after October 1, 1995."[797]

NHTSA listed three Title VI-related short-term objectives in its Civil Rights Implementation Plan. The first objective is to "execute necessary planning and develop a compliance review plan; then conduct one pilot review to ensure compliance with DOT civil rights mandates."[798] The second objective is "to develop linkages between several Historically Black Colleges and Universities (HBCU) and TSP/Office of Contracts and Procurement, and grant program recipients."[799] The third objective is to "develop in concert with Hispanic organizations a series of workshops, media announcements, etc., to ensure that highway safety messages 'reach' the Hispanic community nationwide."[800] These objectives are laudable, but fall far short of the requirements necessary for NHTSA to achieve its long-range goal of having a viable civil rights plan. NHTSA is not using its implementation plan to plan budget, staffing, and workload information, as required by the Department of Justice.

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[791] *See* ibid., p. 7.

[792] Ibid., p. 8.

[793] *See* DOJ Guideline for Agency Implementation Plans, pp. 3, 4.

[794] Ibid., pp. 9–11.

[795] DOT/NHTSA FY 1994 Implementation Plan, p. 8.

[796] Ibid., p. 8.

[797] Quick letter, p. 5.

[798] Ibid., p. 9.

[799] Ibid.

[800] Ibid.

# Findings and Recommendations

## Organization, Budget, Staffing, and Workload

### Organization

**Finding:** The National Highway Traffic Safety Administration's (NHTSA) Office of Civil Rights (NHTSA/OCR) does not have a separate unit devoted to external civil rights enforcement, but it does have a staff member assigned exclusively to external civil rights. NHTSA has no regional civil rights staff. Given the small size of NHTSA/OCR, its internal organizational structure is adequate. However, the Director of NHTSA/OCR does not report directly to the Administrator of NHTSA. As a result she may not have sufficient status within the agency to ensure that civil rights enforcement is given adequate attention and resources.[801]

**Recommendation:** NHTSA should revise its organizational chart so that the Director of NHTSA/OCR reports directly to the Administrator.

### Budget, Staffing, and Workload

**Finding:** Although NHTSA's external civil rights workload has grown over time, NHTSA has had only one staff member assigned to external civil rights enforcement activities since the 1980s. It is not possible for one staff member to fulfill NHTSA's entire external civil rights compliance and enforcement responsibilities.[802]

**Recommendation:** NHTSA should assign sufficient additional staff to external civil rights enforcement to permit the agency to build a viable Title VI compliance and enforcement program. At the very least, NHTSA should give NHTSA/OCR one staff member assigned to policy and program development, including developing regulations, guidelines, procedures and policies for NHTSA's Title VI program, as well as developing an annual civil rights enforcement plan for the Administration. NHTSA should also give NHTSA/OCR sufficient staff to carry out NHTSA's operational responsibilities—monitor effectively the Title VI compliance of its State recipients, as well as to carry out the Administration's other external civil rights obligations. At a minimum, an additional five staff persons are needed to perform these duties.

## Regulations, Guidelines, Policies, and Procedures

**Finding:** NHTSA has no Title VI regulations, guidelines, policies, or procedures. As a result, NHTSA does not have an adequate documentary basis for its Title VI program.[803]

**Recommendation:** NHTSA should assign an additional staff person to NHTSA/OCR to develop NHTSA's regulations, guidelines, policies, and procedures for Title VI. At a minimum, NHTSA should develop a guideline specifying the relative roles and responsibilities of NHTSA and its State recipients. The guideline should specify that State recipients are required to have a Title VI compliance program. To be acceptable, the program should including appointing a full-time Title VI compliance officer as well as implementing a system for handling complaints of discrimination, a system for reviewing the compliance status of subrecipients, an outreach and education program, and a system for collecting and analyzing data from recipients. States should be required to develop annual civil rights enforcement plans and annual Title VI self-assessments, to be submitted to NHTSA for review and approval. The guideline should specify the necessary elements of an outreach and education program, including the obligation to make information available in languages other than English, and should specify what data States should collect from recipients and report to NHTSA. In addition to this guideline, NHTSA should develop an internal procedures manual laying out its procedures for investigating complaints and conducting preaward and postaward compliance reviews. These procedures should include a discussion of the types of information that must be considered to reach a finding of compliance or noncompliance and give examples of instances of noncompliance in NHTSA's programs.

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[801] *See* p. 584.

[802] *See* p. 585.

[803] *See* p. 586.

### Process of Title VI Enforcement

**Finding:** NHTSA does not have an operational Title VI enforcement program. Thus, NHTSA does not conduct preaward or postaward reviews of recipients, process complaints, conduct outreach and education, or provide technical assistance to its recipients. Thus, NHTSA is not even minimally meeting its responsibility to ensure that recipients are in compliance with Title VI.[804]

**Recommendation:** NHTSA should take steps to implement the key elements of a Title VI enforcement program: preaward reviews, postaward desk audit and onsite compliance reviews, complaint investigations, outreach and education, and technical assistance.

### Oversight of States' Title VI Compliance

**Finding:** All of NHTSA's recipients are State agencies. NHTSA itself admits that the State agencies do not understand their Title VI compliance responsibilities. However, NHTSA does not monitor and oversee the States' Title VI compliance programs.[805]

**Recommendation:** NHTSA should implement an effective system for monitoring States' Title VI compliance programs. As recommended above, NHTSA should develop Title VI guidelines indicating the States' responsibilities. NHTSA should monitor the States' implementation of these responsibilities by reviewing the States' annual civil rights enforcement plans and Title VI self-assessments. In addition, NHTSA should conduct periodic onsite reviews of the States' Title VI compliance programs. Finally, NHTSA should provide technical assistance and civil rights training to State staff.

### Staff Training

**Finding:** Because NHTSA has not engaged in Title VI enforcement activities during the past 10 years, NHTSA's staff has inadequate experience and desperately needs training on Title VI.[806]

**Recommendation:** NHTSA should immediately provide comprehensive training on Title VI and other civil rights statutes governing federally funded programs to its staff member assigned to external civil rights enforcement. NHTSA should seek experienced new staff members and provide them with comprehensive training as well. Thereafter, NHTSA should provide regular update training to its civil rights staff.

### Reporting Requirements, Data Collection, and Data Analysis

**Finding:** NHTSA does not require recipients to report on their Title VI compliance and does not have in place a data collection and analysis system.[807]

**Recommendation:** NHTSA should require recipients to report annually on their Title VI compliance. Specific reporting requirements should be included in NHTSA's Title VI guideline and, to the extent feasible given the nature of NHTSA's programs, should be modeled after those in FTA's guideline. NHTSA should develop a system for reviewing and analyzing the data submitted by recipients. NHTSA should use the system to conduct preaward and postaward desk-audit reviews of recipients, to select recipients for onsite compliance reviews, and to conduct general analyses of its programs to ensure that all individuals have equal opportunity to participate in NHTSA's federally funded programs and that the programs do not have an adverse discriminatory impact on protected groups.

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[804] *See* pp. 586–87.

[805] *See* pp. 587–88.

[806] *See* p. 588.

[807] *See* p. 588.

### Civil Rights Implementation Plans

**Finding:** NHTSA's Civil Rights Implementation Plan does not fulfill the purposes envisioned by the U.S. Department of Justice in its "Guideline for Agency Implementation Plans Required by Executive Order 12,250, 'Leadership and Coordination on Nondiscrimination Laws.'" Although the plan truthfully describes how little NHTSA is doing in the Title VI area, the goals and objectives section of the plan is inadequate. It does not conform to the Department of Justice guidelines, which require that the agency have long-range goals, major objectives in each functional area, and short-term objectives for each major objective. The plan's short-term objectives fall far short of the requirements necessary for NHTSA to achieve its long-range goal of having a viable civil rights enforcement program. Finally, NHTSA is not using its plan as a planning tool or basing its planning on budget, staffing, and workload information.[808]

**Recommendation:** NHTSA should develop its Civil Rights Implementation Plans in conformance with the Department of Justice guideline. In particular, NHTSA should describe its civil rights enforcement process more fully. Furthermore, NHTSA should develop specific goals and objectives, with measures and timeframes for accomplishing them, for each of the parts of the Title VI implementation process. Finally, NHTSA should use the plans as a management tool. Thus, the plans should be sufficiently specific and detailed to serve as a civil rights enforcement plan.

### Overall Finding and Recommendation

**Finding:** NHTSA does not have an operational Title VI compliance and enforcement program.

**Recommendation:** NHTSA should commit itself to building a viable Title VI compliance and enforcement program. To do this, NHTSA should assign at least six additional staff members to NHTSA/OCR to carry out Title VI compliance and enforcement activities, including one assigned to developing implementing regulations, guidelines, policies, and procedures and a Title VI enforcement plan. NHTSA/OCR should develop the necessary guidelines and procedures and implement a Title VI enforcement program that includes preaward reviews, postaward reviews, complaint investigations, outreach and education and technical assistance. NHTSA/OCR should also implement an adequate data collection and analysis system and ensure that its staff receive comprehensive formal civil rights training.

## Research and Special Programs Administration

The Research and Special Programs Administration (RSPA) is responsible for hazardous materials transportation safety and for pipeline safety, transportation emergency preparedness, safety training, conducting transportation research, and collecting and disseminating air carrier economic data.[809]

### Federally Assisted Programs

The RSPA funds four federally assisted programs:

> The *pipeline safety program* helps develop and maintain State natural gas, liquified natural gas, and hazardous liquid pipeline safety programs. It benefits State agencies.[810] Assistance is in the form of performance-based formula grants to State agencies.[811]
>
> The *university transportation centers program* provides grants to nonprofit institutions of higher learning to establish and operate university transportation centers for research,

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[808] *See* pp. 588–89.

[809] Office of the Federal Register and the National Archives and Records Administration, *The United States Government Manual, 1994/95* (Superintendent of Documents: Washington, D.C., 1994), p. 477.

[810] Office of Management and Budget and U.S. General Services Administration, *1993 Catalog of Federal Domestic Assistance* (Superintendent of Documents: Washington, D.C., 1993), vol. 1, p. 473.

[811] Ibid.

education, and technology transfer programs on regional and national transportation issues.[812] Assistance is in the form of project grants to institutions of higher education that offer degrees in transportation and have established transportation research programs.[813]

The *university research institutes program* provides grants to nonprofit institutions of higher learning to establish and operate university research institutes to advance U.S. technology and expertise in transportation through focused programs of research, technology transfer, and education.[814] Assistance is in the form of project grants to institutions of higher education.[815]

*Interagency hazardous materials public sector training and planning grants* increase State, local, and Indian tribal effectiveness in safe and efficient handling of hazardous materials accidents and incidents, enhance implementation of the Emergency Planning and Community Right-to-Know Act of 1986, and encourage a comprehensive approach to emergency planning and training by incorporating response to transportation standards.[816] Assistance is provided in the form of project grants to States.[817]

## Organization, Budget, Staffing, and Workload

### Organization and Responsibilities

Enforcement of Title VI at the RSPA is the responsibility of the Office of Civil Rights (RSPA/OCR).[818] RSPA/OCR is a staff office headed by a Director who reports to RSPA's Administrator.[819]

RSPA/OCR has responsibility for internal and external civil rights enforcement, including Title VI. In addition, the RSPA has several responsibilities outside of the civil rights arena, including the Freedom of Information Act, the Privacy Act, and RSPA's internal drug program.[820]

It is the responsibility of RSPA/OCR to administer, coordinate, and assure implementation of civil rights and equal employment opportunity precepts in all official actions, including employment practices; services rendered to the public; employment practices of contractors and subcontractors under direct or federally assisted activities; and other programs and efforts involving RSPA assistance, participation and/or endorsement.[821]

In addition to Title VI enforcement, RSPA/OCR is responsible for: 1) providing technical advice and assistance to the Administrator, Deputy Administrator, and other offices regarding all civil rights matters; 2) developing implementation policies and programs, and, as authorized, issuing implementing standards and evaluating the implementation and administration of the programs for compliance with Federal equal opportunity precepts; 3) coordinating the legal aspects of the civil rights program with the Research and Special Programs Administration's Chief Counsel; 4) coordinating FOIA and Privacy Act requests; and 5) managing the agency's internal drug program.[822]

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[812] Ibid., p. 474.

[813] Ibid.

[814] Ibid., p. 475.

[815] Ibid.

[816] Ibid., p. 475.

[817] Ibid.

[818] U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Transportation, Research and Special Programs Administration, Q. 20, p. 19 (hereafter cited as DOT/RSPA Survey).

[819] Ibid.

[820] Judith Foist, Director, Special Programs, Office of Civil Rights, Research and Special Programs Administration, U.S. Department of Transportation, letter to Frederick D. Isler, Acting Assistant Staff Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, Sept. 30, 1994, p. 6 (hereafter cited as Foist September 1994 letter).; DOT/RSPA Survey, Q. 23, p. 20.

[821] DOT/RSPA Survey, Appendix 1, Rights Mission and Function Statement.

In addition to RSPA/OCR staff, the RSPA's Office of Pipeline Safety has one grants specialist and approximately 20 field engineers who devote a percentage of their time to Title VI issues as part of the overall performance-based review of the pipeline program.[823]

Given the small size of RSPA's civil rights enforcement program, the organizational structure of its civil rights office is adequate. However, it should be noted that a large portion of the Administration's Title VI enforcement activities is carried out by program people, who not only do not report to the Director of RSPA/OCR, but who are not trained civil rights specialists. For such staff to conduct adequate Title VI enforcement, a close working relationship with RSPA/OCR is necessary.

### Budget, Staffing, and Workload

The RSPA's budget for fiscal year 1993 totaled $50 million,[824] of which only $4,000 was spent directly on civil rights programs.[825]

RSPA/OCR has a very small staff. In fiscal year 1990, RSPA/OCR had one full-time equivalent position (FTE) at headquarters. This person had responsibility for internal and external civil rights programs, as well as matters related to the Freedom of Information Act, the Privacy Act, and RSPA's internal drug program.[826] In fiscal year 1992, RSPA/OCR added one more FTE, a trainee with across-the-board responsibilities.[827] In 1993 the RSPA assigned a Schedule A position to headquarters to address FOIA requests and oversee a "People with Disabilities" program.[828] No changes occurred in fiscal year 1994.[829] RSPA/OCR spends most of its staff time on non-civil rights matters, such as the Freedom of Information Act.[830] As a result, RSPA/OCR has less than one full-time equivalent civil rights specialist devoted to external civil rights enforcement, including Title VI.

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[822] Ibid; Judith Foist, Director, Office of Civil Rights, Research and Special Programs Administration, U.S. Department of Transportation, letter to Frederick D. Isler, Acting Assistant Staff Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, Apr. 21, 1995, enclosure, p. 1 (hereafter cited as Foist April 1995 letter, enclosure).

[823] Ibid., Q. 21, p. 19.

[824] Ibid., Q. 33, p. 27.

[825] Ibid., Q. 33, pp. 27–28. The $4,000 figure does not include salaries or other overhead expenses.

[826] Judith Foist, Special Programs Director, Office of Civil Rights, Research and Special Programs Administration, U.S. Department of Transportation, letter to Frederick D. Isler, Acting Assistant Staff Director, U.S. Commission on Civil Rights, July 22, 1994, p. 1 (hereafter cited as Foist July 1994 letter). RSPA also had, and continues to have, an employee in the John A. Volpe National Transportation Systems Center in Cambridge, Massachusetts, assigned to internal civil rights matters. This employee is not part of RSPA/OCR. Foist April 1995 letter, enclosure, p. 2.

[827] Foist July 1994 letter, p. 1; Foist September 1995 letter, enclosure, p. 2.

[828] Foist July 1994 letter, p. 1; Foist September 1995 letter, enclosure, p. 2.

[829] Foist September 1995 letter, p. 2.

[830] Foist September 1994 letter, p. 6. *See also* DOT/RSPA Survey, Q. 23, p. 20; Judy Foist, Director, Office of Civil Rights, Research and Special Projects Administration, U.S. Department of Transportation, interview in Washington, D.C., Sept. 14, 1994, p. 2 (hereafter cited as Foist interview).

According to the RSPA, "lack of staff and money" has impeded the administration's Title VI enforcement.[831] RSPA/OCR has non-civil-rights-related responsibilities that compete with Title VI for resources.[832] In addition, two new responsibilities have increased the workload of RSPA/OCR. In 1991 the Administration assumed two university grants programs and, 2 years later, initiated the hazardous materials reimbursable grants program.[833]

Thus, a lack of resources and an increasing workload effectively prevent RSPA/OCR from carrying out its Title VI enforcement responsibilities.

### DOT Reorganization

Under DOT's reorganization, as originally proposed, RSPA/OCR would not have been abolished or downsized.[834] RSPA/OCR's Director indicated that she believed that it would have shifted staff responsibilities. RSPA/OCR's emphasis would have been on the internal equal employment opportunity process (including affirmative action and the diversity employment programs). The office would have continued processing Freedom of Information Act requests.[835] It would have continued conducting preaward onsite reviews, but these would have been the only external civil rights function. The Office of the Secretary's OCR would have handled all other external civil rights responsibilities.[836]

## Regulations, Guidelines, Policies, and Procedures

Title VI implementation at RSPA is guided by DOT's Title VI regulations[837] and DOT Order 1000.12.[838] However, RSPA does not have guidelines, polices, or procedures specifically tailored to its federally assisted programs. Thus, RSPA does not have an adequate documentary basis for a sound Title VI enforcement program.

## Process of Title VI Enforcement

### Preaward Reviews

The RSPA requires that all applicants submit Title VI assurances. No award is granted without "proper" Title VI assurances.[839] RSPA/OCR performs preaward reviews of recipients.[840] They appear to be limited to cursory desk-audit reviews to ensure that "proper" Title VI assurances have been submitted.[841]

Each year, RSPA/OCR reviews grant applications by State agencies for pipeline safety grants administered by RSPA's Office of Pipeline Safety.[842] RSPA/OCR also reviews grant applications for university research and education grants, which other DOT administrations also review. Finally, RSPA/OCR reviews applications for grants administered by RSPA's Office of Hazardous Materials, which gave out its first grant awards in fiscal year 1993.[843]

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[831] DOT/RSPA Survey, Q. 82(b), p. 61.

[832] *See* ibid., Q. 28, p. 23.

[833] DOT/RSPA Survey, Q. 27, p. 23.

[834] Foist interview, p. 2.

[835] Ibid.

[836] Ibid.

[837] 49 C.F.R. Part 21 (1994).

[838] U.S. Department of Transportation, Order 1000.12, "Implementation of the Department of Transportation Title VI Program" (hereafter cited as DOT Order 1000.12).

[839] Foist September 1994 letter, p. 3. *See also* DOT/RSPA Survey, Q. 42, p. 38.

[840] Foist September 1994 letter, p. 3.

[841] *See* ibid.; DOT/RSPA Survey, Q. 42, p. 38.

[842] Foist September 1994 letter, p. 3.

In fiscal year 1992, RSPA/OCR conducted 108 preaward desk-audit reviews of applications for a total of approximately $7 million in financial assistance.[844] In fiscal year 1993, RSPA/OCR conducted 108 preaward desk-audit reviews of applications for a total of approximately $16.4 million in financial assistance.[845] None of these reviews resulted in a denial of an award.[846] As of September 14, 1994, RSPA/OCR had conducted 135 preaward desk-audit reviews.[847]

Given the small number of staff RSPA/OCR has available to conduct Title VI enforcement activities (less than one person), RSPA/OCR is accomplishing a large number of preaward reviews. However, the quality of these reviews is unlikely to be sufficient to ensure that all recipients of RSPA funds are in compliance with Title VI.

### Postaward Desk-Audit and Onsite Compliance Reviews

The RSPA program offices are responsible for conducting program reviews, which include civil rights issues. RSPA/OCR conducts desk-audit reviews of the program offices' reports, as well as reports submitted by recipients.[848]

Program staff visit each university grant recipient annually and receive detailed reports from the university grant recipients. In addition, university grant recipients also submit quarterly reports to the program offices. RSPA/OCR reviews these reports.[849] Program staff from the Office of Pipeline Safety conduct program evaluations of its recipients. These evaluations include one or two onsite inspections each year, during which the program staff provide technical assistance and evaluate the recipients for the following year's awards.[850] Recipients of the hazardous materials grant program, which began in 1993, were reviewed by RSPA/OCR for compliance before award of additional funds in 1994.[851]

Thus, although the program staff conduct onsite reviews, RSPA/OCR does not do so.[852] Given that there is no evidence that the RSPA program staff have received adequate civil rights training, these onsite reviews are unlikely to be effective means of uncovering noncompliance with the requirements of Title VI and other civil rights statutes.

### Complaint Investigations

The RSPA receives very few civil rights complaints. In 1992 and 1993, it received a total of two complaints, both of which were Title VII complaints.[853] The lack of complaints RSPA receives is an indication that RSPA's outreach and education on Title VI is inadequate.

### Outreach, Education, and Technical Assistance

Outreach and education is the responsibility of RSPA's program offices. The Director of RSPA/OCR gave examples of the recipients of

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[843] Ibid.

[844] DOT/RSPA Survey, Q. 41(c),(d),(e) p. 36.

[845] Ibid.

[846] Ibid., Q. 41(g), p. 36.

[847] Foist interview, p. 1.

[848] Foist September 1994 letter, p. 3.

[849] Ibid.

[850] Ibid., pp. 3–4.

[851] Ibid., p. 4.

[852] Ibid., p. 4.

[853] DOT/RSPA Survey, Q. 71, p. 51.

RSPA's outreach and education efforts, but did not provide information on the subject matter of these efforts.[854] Program staff are also responsible for providing technical assistance to recipients. In fiscal year 1994, they conducted three workshops for recipients of hazardous materials grants and four workshops for the pipeline safety program.[855] However, the civil rights information provided in these workshops only describes how to prepare a Title VI Assurance form.[856] RSPA program staff provide technical assistance to university grant recipients throughout the year and during the course of the annual visits.[857] Thus, RSPA is conducting extremely little outreach and education and providing little technical assistance on Title VI.

## Staff Training

New civil rights staffers at RSPA receive only on-the-job training in civil rights compliance.[858] No civil rights staff member has received Title VI training since 1992.[859] Furthermore, as noted above, there is no indication that RSPA program staff, who conduct most of RSPA's onsite reviews of recipients and provide technical assistance, have had civil rights training.

## Reporting Requirements, Data Collection, and Analysis

Contrary to the requirements of DOT Order 1000.12,[860] RSPA does not require recipients to develop a system for establishing baseline data sufficient to monitor compliance.[861] It does not require recipients to assess annually minority participation in federally assisted programs[862] or to submit annual reports comparing participation in programs with eligibility.[863]

However, RSPA/OCR has used census data to determine the need for translations of emergency response documents, brochures, and guidelines.[864] It uses other publicly available data, such as Bureau of Labor Statistics data, as background information.[865] Furthermore, it also has used student enrollment data to track minorities in graduate and undergraduate programs related to transportation. It requires university grant recipients to report on minority recruitment programs and fellowships for minority faculty. It considers other outcome measures, such as the number of contacts/announcements, the number of applications received, and selections.[866]

Although RSPA/OCR has used data analysis on occasion in its enforcement activities, it does not have an adequate data collection and analysis system in place. Thus, RSPA does not have available to it the type of information necessary to conduct thorough desk-audit reviews of its recipients.

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[854] Foist September 1994 letter, pp. 4–5.

[855] Ibid., p. 4.

[856] *See* ibid.

[857] Ibid.

[858] DOT/RSPA Survey, Q. 49, p. 42.

[859] Foist September 1994 letter, p. 6.

[860] *See* discussion on the responsibilities of the modal administrations, pp. 520–22 above, for these requirements.

[861] DOT/RSPA Survey, Q. 59, p. 44.

[862] Ibid., Q. 61, p. 45.

[863] Ibid., Q. 62, p. 45.

[864] Foist September 1994 letter, p. 5.

[865] Ibid., pp. 5–6.

[866] Ibid., p. 5.

### Civil Rights Implementation Plans

There is no evidence available to the Commission indicating that RSPA has prepared Civil Rights Implementation Plans.

## Findings and Recommendations

### Organization, Budget, Staffing, and Workload

**Finding:** The Research and Special Program Administration's (RSPA) Office of Civil Rights (RSPA/OCR) has too few staff to carry out its vast responsibilities, some not related to civil rights. Thus, RSPA/OCR has less than one person devoted to external civil rights compliance and enforcement. As a result, RSPA/OCR relies too heavily on untrained program personnel to ensure that its recipients are in compliance with Title VI.[867]

**Recommendation:** RSPA should assign additional staff to RSPA/OCR to permit that office to carry out its civil rights compliance and enforcement mandate. In particular, RSPA should assign one staff member to develop implementing guidelines, policies, and procedures for Title VI and the other external civil rights statutes and engage in planning for its external civil rights program. In addition, RSPA should assign two or three other staff members to carry out RSPA's operational responsibilities, including monitoring and providing assistance to the program personnel engaged in civil rights activities and conducting periodic onsite reviews of recipients.

### Regulations, Guidelines, Policies, and Procedures

**Finding:** RSPA has no Title VI regulations, guidelines, policies, or procedures. As a result, RSPA does not have an adequate documentary basis for its Title VI program.[868]

**Recommendation:** RSPA should assign an additional staff person to RSPA/OCR to develop RSPA's regulations, guidelines, policies, and procedures for Title VI. At a minimum, RSPA should develop one Title VI guideline covering its program funding research grants for universities and another guideline covering its continuing State programs. This guideline should specify the relative roles and responsibilities of RSPA and its State recipients. The guideline should specify that State recipients are required to have a Title VI compliance program. In addition, RSPA should develop an internal procedures manual to guide its preaward and postaward reviews and its complaint investigations. The manual should include a review of the types of information that should be considered in the reviews and investigations.

### Process of Title VI Enforcement

#### Preaward Reviews

**Finding:** RSPA/OCR staff conduct preaward reviews of all recipients, but these reviews are extremely cursory.[869]

**Recommendation:** RSPA should develop preaward review procedures. The procedures should include reporting requirements for applicants for assistance. RSPA should require all applicants to submit, not just Title VI assurances, but sufficient data for RSPA/OCR to conduct a desk-audit preaward review of the applicant's program. RSPA/OCR staff should review and analyze these data during the course of its preaward reviews.

#### Postaward Reviews

**Finding:** RSPA/OCR staff do not conduct postaward reviews of recipients. Program personnel include civil rights issues in their regular onsite program reviews. However, program personnel are neither sufficiently trained nor sufficiently experienced in Title VI to conduct more than cursory Title VI compliance reviews.[870]

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[867] *See* p. 595.

[868] *See* p. 595.

[869] *See* p. 595.

**Recommendation:** RSPA/OCR should provide training and technical assistance to program personnel to assist them in incorporating civil rights into their program reviews. However, RSPA/OCR also should supplement the program personnel's efforts by instituting its own postaward reviews. RSPA/OCR should conduct postaward desk-audit reviews of all recipients based on information provided annually by the recipients. Furthermore, RSPA/OCR should conduct onsite reviews of recipients. State recipients and universities receiving research grants on a continuing basis should be reviewed periodically. Other recipients should be selected for onsite review when the postaward desk-audit reviews reveal potential problems.

### Outreach and Education

**Finding:** RSPA/OCR does not conduct outreach and education on Title VI. It delegates this responsibility to the RSPA program offices. Thus, RSPA does not conduct adequate outreach and education on Title VI.[871]

**Recommendation:** RSPA/OCR should develop and implement a strategic outreach and education plan to ensure that recipients, program participants, eligible populations, and affected communities are afforded adequate information about their rights under Title VI to be able to vindicate these rights. RSPA/OCR should retain chief responsibility for RSPA's outreach and education efforts. It should prepare informational materials, provide outreach and education at workshops and conferences, and coordinate the outreach and education efforts of the RSPA program offices.

### Technical Assistance

**Finding:** RSPA's technical assistance is limited to program personnel helping applicants and recipients to submit Title VI assurances. However, RSPA/OCR staff do not provide technical assistance on compliance with Title VI. Thus, RSPA's technical assistance program is inadequate.[872]

**Recommendation:** RSPA/OCR should provide technical assistance to recipients to assist them in complying with Title VI. Technical assistance should be offered upon request, but RSPA/OCR should also provide technical assistance proactively during the course of onsite compliance reviews and when emerging issues require it.

## Staff Training

**Finding:** RSPA does not provide adequate civil rights training to its civil rights staff. None has received training in the past 3 years. Furthermore, RSPA does not provide civil rights training to it program staff engaged in Title VI enforcement.[873]

**Recommendation:** RSPA should provide comprehensive civil rights training, including training on Title VI, as well as training on its federally assisted programs to all new civil rights staff. In addition, RSPA should provide periodic update training to refresh and deepen staff members' understanding of Title VI and to address emerging Title VI issues. Finally, RSPA should provide regular training on Title VI to its program personnel engaged in Title VI enforcement activities. Such training should emphasize the broad coverage of Title VI to an entire institution receiving funds and give concrete examples of violations of Title VI in RSPA programs.

## Reporting Requirements, Data Collection, and Data Analysis

**Finding:** Although RSPA occasionally makes use of data in its evaluations of recipients, it does not have in place systematic reporting requirements for recipients or a system for collecting and analyzing data submitted by recipients.[874]

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[870] *See* p. 596.

[871] *See* pp. 596–97.

[872] *See* p. 597.

[873] *See* p. 597.

**Recommendation:** RSPA should develop and implement a comprehensive data system. This system should include specific reporting requirements for its recipients to be outlined in its Title VI guidelines. The data requirements of States should be different from those of universities receiving research grants from RSPA. RSPA should collect and analyze these data on an annual basis, both to assist it in determining the compliance status of recipients and to ensure that its programs are open, on an equitable basis, to all demographic groups.

### Civil Rights Implementation Plans

**Finding:** RSPA does not prepare or submit Civil Rights Implementation Plans to the Office of the Secretary's OCR or to the U.S. Department of Justice.[875]

**Recommendation:** RSPA should develop an annual Civil Rights Implementation Plan in conformance with the Department of Justice's "Guideline for Agency Implementation Plans Required by Executive Order 12,250, 'Leadership and Coordination on Nondiscrimination Laws.'" The plan should give a complete description of RSPA's civil rights compliance and enforcement program, including its federally assisted programs, the civil rights authorities it enforces, the organizational structure of its civil rights enforcement program, a discussion of its budget and staffing, and detailed descriptions of its Title VI compliance and enforcement activities. Furthermore, RSPA should use the plan as a management tool. It should develop specific goals and objectives with measurable outcomes and timeframes for accomplishing them, as required by the Department of Justice. The goals and objectives should be formulated based on available staff and other resources. Finally, the plan should include a detailed report indicating program accomplishments and progress made towards each of its goals and objectives.

## U.S. Coast Guard

The U.S. Coast Guard is a branch of the U.S. Armed Forces, but, except during period of war or as otherwise directed by the President, operates under DOT. The Coast Guard acts in a number of different areas, including: search and rescue; maritime law enforcement; marine licensing and inspection; marine environmental protection; port safety and security; waterways management; operating aids to navigation, such as lights, buoys, and fog signals; bridge administration; ice operations; deepwater ports; Great Lakes pilotage; and boating safety issues.[876] The Coast Guard also operates the Coast Guard Auxiliary, maintains a state of military readiness, and provides reserve training for qualified individuals.[877]

### Federally Assisted Programs

The Coast Guard administers two federally assisted programs:

> The *boating safety financial assistance program* seeks to encourage greater State participation and uniformity in boating safety, particularly to permit the States to assume the greater share of boating safety education, assistance, and enforcement activities, and to assist the States in developing, carrying out and financing their recreational boating safety programs.[878] The program also benefits certain national nonprofit public service organizations' boating safety projects. Members of the boating public are eligible to benefit from the program.

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[874] *See* pp. 597–98.

[875] *See* p. 598.

[876] Office of the Federal Register and the National Archives and Records Administration, *The United States Government Manual, 1994/95* (Superintendent of Documents: Washington, D.C., 1994), pp. 4459–61.

[877] Ibid.

[878] Office of Management and Budget and U.S. General Services Administration, *1993 Catalog of Federal Domestic Assistance* (Superintendent of Documents: Washington, D.C., 1993), vol. 1, p. 440.

Assistance is given to States in the form of project and formula grants.[879]

The *State access to the oil spill liability trust fund* is designed to encourage greater State participation in response to actual or threatened discharges of oil.[880] Assistance is given to States in the form of project grants.[881]

In fiscal year 1993, the Coast Guard provided more than $38 million in financial assistance to 73 recipients.[882] The Coast Guard's recipients include 55 State governments and U.S. territories and 14 national nonprofit organizations.[883]

## Organization, Budget, Staffing, and Workload

### Organization and Responsibilities

Enforcement of Title VI and other civil rights statutes[884] at the Coast Guard is the responsibility of the Office of Civil Rights (USCG/OCR).[885] USCG/OCR is located in the Office of the Commandant.[886] It is headed by a Chief who reports to the Vice Commandant of the Coast Guard.[887] It consists of three divisions: the Policy, Planning, and External Civil Rights Division; the Military Equal Opportunity Division; and the Civilian Equal Opportunity Division.[888] Of these, only the Policy, Planning, and External Civil Rights Division performs Title VI enforcement.[889] In addition to Title VI, the Policy, Planning, and External Civil Rights Division is responsible for enforcing Title IV of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act, and Executive Order 12,898 on environmental justice. It also manages other external programs, such as the Coast Guard's programs relating to historically black colleges and universities.[890]

The only other office with external civil rights responsibilities at the Coast Guard is the Office of

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[879] Ibid.

[880] Ibid., p. 441.

[881] Ibid.

[882] U.S. Department of Transportation, U.S. Coast Guard, "Fiscal Year 1994 Civil Rights Implementation Plan," Workload and Performance Data, Attachment C, p. 10 (hereafter cited as DOT/USCG FY 1994 Implementation Plan).

[883] Ibid., p. 2.

[884] In addition to Title VI, USCG/OCR is responsible for enforcing: Department of Transportation Regulation 49 C.F.R. Parts 21 and 23 (1994); Department of Justice Regulation, 28 C.F.R., Subpart F, Part 42 (1993); DOT Order 1000.12; DOT Order 1050.2; section 504 of the Rehabilitation Act of 1973, 29 U.S.C § 794 (1988 & Supp. V 1993); Title IX of the Education Amendments Act of 1972, 20 U.S.C. §§ 1681–1688 (1988)); the Age Discrimination Act of 1975, 42 U.S.C. 6101–6107 (1988); the Civil Rights Restoration Act of 1987, Pub. L. No. 100–259, 102 Stat. 28 (codified as amended in scattered sections of U.S.C.); Commandant Instruction M16755.3 (National Recreational Boating Safety Financial Assistance); and Commandant Instruction M16755.2 (Financial Assistance Program for National Nonprofit Public Service Organizations).

[885] DOT/USCG FY 1994 Implementation Plan, pp. 2–3; DOT/USCG Survey, Q. 20, p. 17.

[886] U.S. Commission on Civil Rights, *Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964*, December 1993, completed by the U.S. Department of Transportation, United States Coast Guard, Q. 20, p. 17 (hereafter cited as DOT/USCG Survey).

[887] Ibid.

[888] Ibid., Appendix 1, Organizational chart.

[889] *See* ibid., Appendix, "Policy/Planning and External Programs Division"; W.R. Somerville, Chief, Office of Civil Rights, U.S. Coast Guard, U.S. Department of Transportation, letter to Frederick D. Isler, Acting Assistant Staff Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, U.S. Commission on Civil Rights, Sept. 12, 1994, p. 1 (hereafter cited as Somerville letter).

[890] Ibid., pp. 1–2.

Navigation Safety and Waterway Services, which may initiate enforcement action for failure of a grantee or subgrantee to comply with the terms of the grant.[891]

The organizational structure of the Coast Guard's civil rights enforcement function is adequate. In particular, external civil rights enforcement is conducted by a separate office within USCG/OCR from the offices engaged in internal civil rights activities. However, that the Director of USCG/OCR does not report directly to the Commandant of the Coast Guard may hamper his ability to ensure that the Coast Guard provides adequate resources and priority to civil rights enforcement.

### Budget, Staffing, and Workload

In 1994, USCG/OCR had a full-time equivalent staff of 21, 13 of whom were in the Washington, D.C., headquarters office.[892] The Policy, Planning and External Programs Division had four full-time employees, two of whom were assigned to Title VI enforcement.[893]

USCG/OCR did not provide the Commission with information on its budget or workload. The lack of such information is an indication that USCG/OCR may not have in place a system of tracking its expenditures and resource allocation. As a result, USCG/OCR is unlikely to engage in the type of formal management planning necessary to ensure that Title VI, as well as other civil rights statutes, is enforced adequately.

## Regulations, Guidelines, Policies, and Procedures

In addition to DOT's Title VI regulations[894] and DOT Order 1000.12,[895] the Coast Guard developed Commandant Instruction 5350.20 for supplemental guidance.[896] The purpose of the Instruction is "to implement the provisions of Title VI of the Civil Rights Act of 1964, as amended,. . . and of various other Federal statutes and regulations that prohibit unlawful discrimination in any program or activity receiving Federal financial assistance from the Coast Guard."[897] The instruction identifies the relevant civil rights authorities, including Title VI, states the Coast Guard's nondiscrimination policy with respect to its financial assistance programs, defines the types of recipients to whom the nondiscrimination requirements apply, defines relevant terms, and outlines the responsibilities and requirements of various Coast Guard entities and Coast Guard recipients.[898]

The instruction includes, as an enclosure, Title VI guidelines for Coast Guard applicants and recipients.[899] These guidelines discuss applicants' Title VI self-assessments, the preaward application review, onsite reviews, postaward compliance reviews, determinations of compliance, resolution of noncompliance, and the complaint processing process.[900]

The Coast Guard has also issued another instruction addressing the financial assistance ganizations.[901] This instruction discusses the financial assistance program generally. It contains a copy of the Title VI assurance agreement, but does not discuss civil rights requirements in any detail.[902]

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[891] Ibid., Q. 21, p. 17.

[892] Ibid., Appendix 6. There are also 25 FTEs in the Coast Guard-Military assigned civil rights responsibilities.

[893] Somerville letter, p. 1.

[894] 49 C.F.R. Part 21 (1994).

[895] U.S. Department of Transportation, Order 1000.12, "Implementation of the Department of Transportation Title VI Program."

[896] U.S. Department of Transportation, U.S. Coast Guard, Commandant Instruction 5350.20, "Civil Rights Compliance by Recipients of Federal Financial Assistance from the Coast Guard," Oct. 12, 1990 (hereafter cited as Commandant Instruction 5350.20).

[897] Ibid., p. 1.

[898] Ibid.

[899] Ibid., enclosure 1, "Title VI Guidelines for Applicants/Recipients" (hereafter cited as DOT/USCG Title VI Guidelines).

[900] Ibid.

The Coast Guard indicated that it had developed a Title VI Standard Operating Procedures guide for conducting civil rights compliance reviews.[903] However, the Coast Guard did not provide the Commission with a copy of this guide.

Thus, the Coast Guard has in place adequate guidelines, policies, and procedures to form a basis for its Title VI enforcement program.

## Process of Title VI Enforcement

### Preaward Reviews

All applicants for Coast Guard financial assistance must submit, with their applications, a Title VI self-assessment.[904] The Coast Guard requires that USCG/OCR review all applications and reach a determination of probable compliance before it makes an award.[905] The preaward review, which includes a review of the applicant's Title VI self-assessment, is supposed to be a "comprehensive civil rights analysis of the project/program to be funded." The review "should ensure that the funded project/program . . . will *not* adversely impact on any person or group of persons because of race, color, national origin, sex, age, or disability."[906]

USCG/OCR conducted 77 desk-audit preaward reviews in fiscal year 1992 and 73 desk-audit preaward reviews in fiscal year 1993.[907] USCG/OCR found none of the reviewed applicants in noncompliance.[908] As of September 12, 1994, USCG/OCR had conducted a total of 70 preaward desk-audit reviews in fiscal year 1994.[909]

The large number of preaward reviews conducted by USCG/OCR, which has only two staff members to perform such reviews, suggests that the reviews do not amount to "comprehensive civil rights reviews."

### Postaward Desk-Audit and Onsite Compliance Reviews

The Coast Guard requires that USCG/OCR conduct periodic postaward reviews, which may either be desk-audit or onsite reviews, of all recipients.[910] It should conduct these postaward reviews of each recipient at least once every 3 years.[911] The Coast Guard's fiscal year 1994 Civil Rights Implementation Plan outlines comprehensive procedures for both desk-audit and onsite reviews.[912]

However, USCG/OCR did not perform any postaward reviews in either fiscal year 1992 or fiscal year 1993 and has not conducted any onsite compliance reviews during the last 5 years.[913] Thus, the Coast Guard is not complying with its own requirement that postaward reviews be conducted of all recipients on a regular basis. Along with its failure to conduct adequate preaward reviews, the failure to conduct adequate postaward reviews indicates that the Coast Guard does not conduct sufficient proactive Title VI enforcement to ensure that all recipients are in compliance with the law.

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[901] U.S. Department of Transportation, U.S. Coast Guard, Commandant Instruction M16755.2, Apr. 16, 1984.

[902] *See* ibid.

[903] DOT/USCG FY 1994 Implementation Plan, p. 19.

[904] Commandant Instruction 5350.20, p. 7.

[905] *See* DOT/USCG Title VI Guidelines, p. 1; DOT/USCG FY 1994 Implementation Plan, p. 7.

[906] DOT/USCG FY 1994 Implementation Plan, p. 7.

[907] DOT/USCG Survey, Q. 41(e), p. 35.

[908] Ibid., Q. 41(g),(h), p. 36.

[909] Somerville letter, p. 2.

[910] DOT/USCG FY 1994 Implementation Plan, p. 9. DOT/USCG Title VI Guidelines, p. 4.

[911] DOT/USCG Title VI Guidelines, p. 4.

[912] DOT/USCG FY 1994 Implementation Plan, pp. 10–13.

### Complaint Investigations

The Office of the Secretary's OCR and USCG/OCR share primary responsibility for the investigation of complaints at the Coast Guard.[914]

During fiscal year 1992, the Coast Guard received two Title VI complaints and resolved both subsequent to formal filing because the recipient did not transmit the complaint until after resolution.[915] No complaints were filed during fiscal year 1993.[916]

The Coast Guard indicated that USCG/OCR had developed and implemented a manually administered complaint tracking system during fiscal year 1993 and planned to computerize the system in fiscal year 1994.[917]

### Outreach and Education

Commandant Instruction 5350.20 specifies that Coast Guard recipients must make all regulations and instructions pertaining to Title VI available to the public upon request. Furthermore, recipients must make available information on their Title VI compliance programs, including: a Title VI poster, a summary of the nondiscrimination requirements of Title VI, and procedures for filing a complaint.[918] All handbooks, manuals, and pamphlets must contain a notification clause providing information on Title VI complaint procedures. This information should be in languages other than English, where appropriate.[919]

The instruction does not discuss USCG/OCR's education and outreach obligations. The Coast Guard indicated that the Chief of USCG/OCR is supposed to "initiate projects and programs to expand visibility in the Coast Guard's [federally assisted programs]." The Chief of USCG/OCR indicated that, for the most part, USCG/OCR's outreach and education efforts have been performed through telephone and written correspondence.[920] USCG/OCR also has made presentations at regional conferences.[921]

Thus, although the Coast Guard requires significant outreach and education efforts on the part of its recipients, the Coast Guard itself does not engage in sufficient outreach and education to ensure that the intended beneficiaries of its federally funded programs are knowledgeable about their rights under Title VI.

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[913] DOT/USCG Survey, Q. 45, p. 39, Q. 67, p. 47; Somerville letter, p. 2.

[914] Ibid., Q. 25, pp. 20–21. *See also* DOT/USCG FY 1994 Implementation Plan, pp. 3–7.

[915] DOT/USCG Survey, Q. 71, p. 50.

[916] DOT/USCG FY 1994 Implementation Plan, Workload and Performance Data (Federally Assisted Programs and ADA Title II), Attachment C, p. 12.

[917] DOT/USCG FY 1994 Implementation Plan, p. 19.

[918] Commandant Instruction 5350.20, p. 7.

[919] Ibid., p. 8.

[920] Somerville letter, p. 3.

[921] Ibid.

### Technical Assistance

The Coast Guard indicated that the Chief of USCG/OCR has the responsibility of ensuring that technical assistance is provided to Coast Guard and State program and management officials. USCG/OCR provides technical assistance during complaint investigations, compliance reviews, training, and staff assistance visits.[922] However, there is no indication of the extent of the Coast Guard's technical assistance activities, which the chief of USCG/OCR describes as "limited."[923]

## Monitoring State Title VI Enforcement

The Coast Guard does not have any cooperative agreements or memoranda of understanding with State and local agencies to provide Title VI enforcement.[924] However, Commandant Instruction 5350.20 requires every State and State agency that receives Federal financial assistance "to establish a Title VI compliance program; to provide for the assignment of Title VI responsibilities to designated to State personnel; and to comply with all referenced authorities including the maintenance of records necessary to permit Coast Guard officials to determine the Title VI compliance of the State agencies and their subrecipients."[925] States must develop and submit methods of administration for their Title VI programs.[926]

The Coast Guard expressed a concern that changes in Federal financial assistance program duties at the State level may result in a lack of continuity in States' Title VI compliance programs.[927] However, there is no indication that the Coast Guard monitors the States' Title VI compliance programs. Thus, the Coast Guard has abrogated its responsibility to ensure that its State recipients are in compliance with Title VI.

## Staff Training

The Coast Guard does not offer civil rights training to new USCG/OCR employees.[928] Regional staff, State and local agency staff, and recipients should receive training from Office of the Secretary's OCR.[929] However, according to the Chief of USCG/OCR, "no currently employed staff member has received Title VI training."[930] The Coast Guard indicated in its fiscal year 1994 Civil Rights Implementation Plan that it intended to develop a Title VI training manual in fiscal year 1994.[931] Although the preparation of a training manual is a step in the right direction, it is clear that Coast Guard staff charged with Title VI enforcement have very little experience or training on Title VI.

## Reporting Requirements, Data Collection, and Analysis

In addition to information on any recent compliance reviews of the applicant and the standard DOT Title VI assurance form, the Coast Guard's Title VI guidelines require applicants for Coast Guard assistance to submit Title VI program information necessary for determining their compliance with Title VI.[932] Furthermore, the Coast

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[922] DOT/USCG FY 1994 Implementation Plan, p. 14.

[923] Somerville letter, p. 3.

[924] DOT/USCG Survey, Q. 30, p. 23.

[925] Commandant Instruction 5350.20, p. 7.

[926] Ibid.

[927] DOT/USCG Survey, Q. 82(d), p. 60.

[928] Ibid., Q. 49, p. 41.

[929] Ibid., Q. 50, p. 41.

[930] Somerville letter, p. 3.

[931] DOT/USCG FY 1994 Implementation Plan, p. 18.

[932] DOT/USCG Title VI Guidelines, p. 2.

Guard requires recipients to submit semi-annual compliance reports that must provide updated information on minority participation in their programs.[933]

The Coast Guard uses data collected to advise recipients of adverse actions that may occur because of the composition of the user group participating in their programs and to determine whether recipients are taking specific steps to make their programs accessible to certain groups.[934] Plans are currently underway to computerize the data collection and analysis process.[935]

## Quality Assurance

According to the 1994 Civil Rights Implementation Plan, the Chief has implemented a manual system that measures the quality and quantity of reports written by the compliance officer. The system is based on a federally assisted program "Interview Guide" that can be used for desk-audit and onsite compliance reviews.[936]

## Civil Rights Implementation Plans

The Commission reviewed the Coast Guard's fiscal year 1994 Civil Rights Implementation Plan.[937] The plan does not provide an adequate overview of the Coast Guard's Title VI implementation and enforcement program. For instance, the plan does not indicate the number of staff assigned to external civil rights activities. Furthermore, the plan provides a great amount of detail on the Coast Guard's procedures for complaints processing, and preaward and postaward reviews, but it does not indicate the extent to which these activities are being conducted and the procedures being followed.[938]

The plan listed three long-range goals, one of which is related to Title VI.[939] That goal is to "[m]aintain an effective program that ensures the enforcement of civil rights and nondiscrimination in the Coast Guard's [federally assisted programs]." The plan also listed seven objectives:

> 1) Process and adjudicate complaints in a timely manner and resolve complaints at the lowest level possible. In addition, the Coast Guard will ensure that recipients display procedures for filing complaints in areas open to the public;
>
> 2) Ensure efficiency of designated Coast Guard program officials and recipient staffs, by providing continuous technical assistance and training;
>
> 3) Ensure recipient compliance through continuous cyclic assessments;
>
> 4) Monitor program implementation by developing, revising and supplementing policy, procedures and guidance as necessary;
>
> 5) Ensure the application of legal and administrative enforcement through enforcement monitoring and sanctions;
>
> 6) Ensure that federally assisted programs and activities are operated in a nondiscriminatory manner and are accessible to all persons; and

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[933] U.S. Coast Guard, Commandant Instruction 5350.20 8.(b)(c).

[934] DOT/USCG FY 1994 Implementation Plan, p. 17.

[935] Ibid.

[936] Ibid.

[937] Ibid.

[938] Ibid., pp. 3–15.

[939] Ibid., p. 18.

7) Recognize recipients of major accomplishments by utilizing the Coast Guard's awards and recognition programs.[940]

The plan also included short-term objectives for fiscal year. The Coast Guard planned to:

1) Conduct three compliance reviews.

2) Transmit self-evaluation and transition forms to all State and nonprofit organizations.

3) Computerize its complaint tracking system.

4) Expand federally assisted program visibility through onsite interaction with recipients and national boating oriented organizations.

5) Participate in State and nonprofit organization conferences.

6) Implement an awards program to recognize outstanding federally assisted programs contributions.

The plan's goals and objectives section is inadequate. Generally, the goals and objectives, except the short-term goals, were insufficiently specific and did not contain timelines for completion. Furthermore, they did not cover all the functional areas, as required by the Department of Justice.[941] Finally, the plan did not relate them to a discussion of USCG/OCR's budget and staff resources.

The plan contained a progress report. It indicated that, in fiscal year 1993, the Coast Guard had completed 73 compliance reviews, developed a Title VI Standard Operating Procedures Guide for conducting civil rights compliance reviews, developed and implemented a manual Title VI complaint tracking system, and provided technical assistance.[942]

The Coast Guard's Civil Rights Implementation Plan is a narrative of the Coast Guard's different civil rights functions and activities. However, it provides no specific details on how these activities have been implemented, how programs and activities have been evaluated for effectiveness, or any productivity information, such as when activities are performed, how often, the duties performed, and how the information from such activities were utilized.

## Findings and Recommendations

### Organization, Budget, Staffing, and Workload

#### Organization

**Finding:** The organizational structure of the U.S. Coast Guard's civil rights enforcement program is adequate. However, the Chief of the Coast Guard's Office of Civil Rights (USCG/OCR) does not report directly to the Commandant. Thus, he may not have sufficient status within the agency to ensure that the Coast Guard gives sufficient resources and priority to civil rights enforcement activities.[943]

**Recommendation:** The Coast Guard change its reporting structure so that the Chief of USCG/OCR reports directly to the Commandant of the Coast Guard.

#### Budget, Staffing, and Workload

**Finding:** The Coast Guard does not have an information management system capable of tracking its civil rights expenditures across different civil rights statutes and activities. Thus, the

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[940] Ibid.

[941] U.S. Department of Justice, "Guideline for Agency Implementation Plans Required by Executive Order 12,250, 'Leadership and Coordination on Nondiscrimination Laws,'" (no date), pp. 9–11.

[942] DOT/USCG FY 1994 Implementation Plan, p. 18.

[943] *See* pp. 601–02.

Coast Guard cannot engage in formal management planning of its civil rights enforcement function.[944]

**Recommendation:** USCG/OCR should develop and implement an information management system that allows it to track civil rights expenditures and workload across different civil rights statutes and functions. USCG/OCR should use this system in preparing an annual civil rights enforcement plan that has specific goals and objectives and assigns specific resources to the tasks necessary to accomplish them. USCG/OCR should also use the system in preparing its annual budget requests. These requests should be based on an analysis of USCG/OCR's workload and resources for its various civil rights responsibilities.

## Regulations, Guidelines, Policies, and Procedures

**Finding:** The Coast Guard has adequate guidelines and procedures for its Title VI enforcement program. However, it does not issue regular policy statements to update and expand its Title VI policies. For instance, the Coast Guard has not issued a statement on the implications of the Civil Rights Restoration Act of 1987 for its Title VI enforcement program.[945]

**Recommendation:** The Coast Guard should supplement its existing guidelines and procedures with policy statements expanding and clarifying its Title VI policies and informing its staff, recipients, and intended beneficiaries about the implications of new Title VI developments, such as the enactment of the Civil Rights Restoration Act of 1987.

## Process of Title VI Enforcement

### Preaward Reviews

**Finding:** The Coast Guard's guidelines require USCG/OCR to conduct comprehensive civil rights reviews of all applicants for Coast Guard assistance before approving funding. However, although the Coast Guard conducts many preaward reviews, they are cursory and do not constitute "comprehensive civil rights reviews." Since, in practice, these preaward reviews are USCG/OCR's only means of monitoring recipients' compliance with Title VI, such cursory reviews are not acceptable.[946]

**Recommendation:** To the extent that preaward reviews remain USCG/OCR's only means of monitoring recipients' Title VI compliance status, they should be comprehensive civil rights reviews as described in the Coast Guard's Title VI guidelines.

### Postaward Reviews

**Finding:** Although the Coast Guard's guidelines require USCG/OCR to conduct periodic postaward reviews of all recipients, USCG/OCR does not conduct postaward reviews.[947]

**Recommendation:** USCG/OCR should conduct annual desk-audit reviews of all recipients. These reviews should be based on the Title VI self-assessment and other data the recipients submit to USCG/OCR. In addition, USCG/OCR should conduct onsite reviews of selected recipients when a desk-audit review reveals potential problems; on a periodic basis, to ensure the accuracy of the information recipients submit to USCG/OCR; and to provide technical assistance to the recipients.

### Outreach and Education

**Finding:** Although the Coast Guard requires its recipients to conduct significant outreach and education, USCG/OCR does not engage in sufficient outreach and education to ensure that the intended beneficiaries of its federally funded programs are knowledgeable about their rights under Title VI.[948]

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[944] *See* p. 602.

[945] *See* pp. 602–03.

[946] *See* p. 603.

[947] *See* pp. 603–04.

**Recommendation:** USCG/OCR should implement an active outreach and education program. It should develop and implement a strategic outreach and education plan to ensure that it uses all available means of informing recipients, program participants, and the public about their rights and responsibilities under Title VI. USCG/OCR should also develop informational materials, such as brochures and posters on Title VI, to assist recipients in meeting their outreach and education obligations.

### Technical Assistance

**Finding:** USCG/OCR does not provide adequate technical assistance. For the most part, it provides technical assistance only during onsite compliance reviews. However, it does not currently conduct such reviews.[949]

**Recommendation:** USCG/OCR should ensure that all recipients receive regular technical assistance on Title VI. USCG/OCR should offer assistance, not only during onsite compliance reviews, but also on an as-needed basis and as USCG/OCR becomes aware of systematic problems.

## Staff Training

**Finding:** USCG/OCR staff do not have training in Title VI.[950]

**Recommendation:** USCG/OCR should provide comprehensive formal civil rights training, including training on Title VI, to its civil rights staff engaged in Title VI compliance and enforcement activities. USCG/OCR should follow up this training with annual training to refresh, update, and deepen its staff's understanding of Title VI.

## Reporting Requirements, Data Collection, and Data Analysis

**Finding:** Although the Coast Guard has adequate data reporting requirements of its recipients, it does not have in place a system to use these data to the fullest in its civil rights compliance process. For instance, it does not analyze these data on a regular basis or use these data to conduct postaward desk-audit reviews of its recipients.[951]

**Recommendation:** The Coast Guard should implement a comprehensive data management and analysis system. It should use this system to analyze the data submitted annually by its recipients to assist it in postaward reviews to determine the compliance status of recipients and to conduct overall analysis of its federally assisted programs to ensure that persons of all demographic groups have an equal opportunity to participate in the programs. This data system can be modeled after the FTA's system, but must be adapted to fit the needs of the Coast Guard's federally funded programs.

## Civil Rights Implementation Plans

**Finding:** The Coast Guard's Civil Rights Implementation Plan does not fulfill the purposes envisioned by the U.S. Department of Justice in its "Guideline for Agency Implementation Plans Required by Executive Order 12,250, 'Leadership and Coordination on Nondiscrimination Laws.'" The plan does not provide an adequate overview of the Coast Guard's Title VI implementation and enforcement program. In particular, it does not discuss the Coast Guard's civil rights staffing and budget, and, although it describes the Coast Guard's procedures in great detail, does not indicate that the Coast Guard does not follow these procedures in many instances. Furthermore, its goals and objectives section is inadequate. The goals and objectives are generally insufficiently specific and do not contain timelines for completing them. Finally, the plan is not used by the Coast Guard as a management tool.[952]

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[948] *See* p. 604.

[949] *See* p. 605.

[950] *See* p. 605.

[951] *See* p. 605–06.

**Recommendation:** The Coast Guard should prepare its Civil Rights Implementation Plans in accordance with the Department of Justice's Guidelines. It should describe its Title VI implementation and enforcement program thoroughly and accurately. Thus, it should indicate the extent to which it is performing the activities required in its procedures. It should formulate specific goals and objectives, with measures of accomplishments and timeframes for achieving them. The goals and objectives should be based on an analysis of the available budget and staff resources. The plan should also discuss progress towards meeting the goals and objectives. Finally, the Coast Guard should incorporate the Civil Rights Implementation Plan in its management planning.

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[952] *See* pp. 606–07.

## Chapter 15

# Findings and Recommendations

## The Overall Title VI Enforcement Effort of Federal Agencies

The Commission has not examined Federal efforts to enforce Title VI since its 1974 report, *The Federal Civil Rights Enforcement Effort*. Although a few agencies have made modest improvements to their Title VI enforcement programs, the overall Title VI enforcement efforts remain inadequate. If the failures and deficiencies cited in this report are not addressed properly, many individuals excluded from, participating in, or otherwise affected by federally assisted programs will continue to face discrimination or the denial of equal opportunities because of their race, ethnicity, or national origin. In some instances, these individuals never will receive the opportunities and benefits that the Federal programs are intended to provide. In other cases, they never will realize their rights to equal access to and equal opportunity to participate in Federal programs. Most important, these individuals will lose faith in the Federal Government's ability to enforce civil rights and to protect the rights of the individual. Therefore, Federal agencies must make serious efforts to assess their Title VI enforcement programs, both with the assistance of this report and through each agency's own means of self-assessment. Through the recommendations of the Commission, all Federal agencies should respond to their deficiencies by adopting effective self-improvement strategies. With improvements to enforcement efforts and a strong commitment to enforcing Title VI, all Federal agencies will become more active and effective in ensuring nondiscrimination in federally assisted and federally conducted programs.[1]

## The Absence of Congressional Oversight and Executive Commitment to Civil Rights

**Finding:** With the passage of Title VI, Congress required Federal agencies to eliminate all barriers that exclude minorities from participating in and enjoying the benefits of Federal financial assistance programs and activities. Congress placed on the Federal funding agencies ultimate responsibility for enforcement of nondiscrimination in their federally assisted programs and activities. Congress also directed the President to provide oversight and coordination for civil rights implementation, compliance, and enforcement. The President delegated this responsibility to the Attorney General.[2]

With few exceptions, the Federal agencies responsible for enforcing Title VI have not conducted any significant Title VI enforcement activities for the past 20 years.[3] This is due, in part, to the fact that Federal agencies have never devoted sufficient resources to Title VI enforcement. Since 1975 overall civil rights budget and staffing have declined. With the passage of new civil rights statutes, such as the Americans with Disabilities Act (ADA), most Federal agencies confronted an increased workload in policy development and complaints relating to the ADA. In their efforts to address initiatives in other civil rights areas, they have diverted resources from Title VI enforcement.[4] Declining resources, a lack of strong commitment to civil rights in general, and Title VI in particular, and an absence of leadership from the U.S. Department of Justice have resulted in an almost complete cessation of Title VI enforcement activities in the Federal Government. Agencies ceased to develop or update their Title VI regulations, guidelines, policies, and procedures and curtailed drastically most compliance and enforcement activities, such as preaward and postaward compliance reviews of recipients. They abandoned proactive strategies for ensuring Title VI compliance, such as providing technical assistance to recipients, conducting outreach and education to inform the public about their rights under Title VI, and maintaining contact with community groups and civil rights organizations to ensure that their Title VI programs were responsive to the needs of their constituents. Many agencies' Title VI programs were reduced to investigation of complaints. Furthermore, because the Federal agencies have conducted no outreach and education on Title VI, the public generally is unaware of its rights under Title VI, and most agencies receive very few Title VI complaints.[5]

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[1] Although Title VI applies only to federally assisted programs, the Commission believes that many of its recommendations will strengthen Federal agencies' civil rights enforcement programs for both federally assisted *and federally conducted programs*. Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under *any program or activity receiving Federal financial assistance*." 42 U.S.C. § 2000d (1988) (emphasis added).

[2] *See* chap. 1, p. 14.

[3] *See* chap. 1, pp. 15–18.

Over the past 2 to 3 years, some agencies have indicated that they are interested in reviving their Title VI enforcement programs, and a few have taken initial steps to do so. However, to date, none of these initiatives has resulted in substantial improvements in the agencies' Title VI enforcement. In particular, although the agencies' civil rights budget and staffing suffered from deep cuts since 1975, the agencies have not made decisive efforts, grounded in serious management and budget planning, to augment the resources they devote to civil rights enforcement generally, and to Title VI in particular. Without effective management and planning, additional resources, and full commitment to their Title VI responsibilities, the Federal agencies can accomplish little, if any, improvement to their Title VI implementation, compliance, and enforcement programs.[6]

**Recommendation:** After 20 years during which the Federal Government completely abandoned Title VI enforcement, resolute and sustained leadership on the part of the President and Congress, as well as the Attorney General, is needed to ensure that agencies reinvigorate their Title VI enforcement programs. To be effective, the President and Congress not only should express their commitment to civil rights enforcement. They also should marshall additional resources necessary for Federal agencies to build comprehensive Title VI implementation, compliance, and enforcement programs, once the agencies demonstrate that they have made all efforts to maximize existing resources. Congress should use its oversight and budgetary authorities to ensure that the Federal agencies allocate and use resources efficiently; that they have resources necessary to implement effective Title VI implementation, compliance, and enforcement programs; and that they discharge their Title VI responsibilities. The Attorney General, through the Department of Justice's Coordination and Review Section, should provide leadership, oversight, and monitoring as well as assistance to Federal agencies as they endeavor to strengthen their Title VI implementation, compliance, and enforcement programs.

The Federal agencies should conduct comprehensive evaluations of their civil rights programs, to determine what activities are necessary to ensure that federally assisted programs are free of discrimination and what budget and staffing levels are essential to accomplish those activities. The evaluations should serve as a basis for the agencies' budgetary requests for their civil rights enforcement programs. Congress and the President should commit to reviewing the agencies' budget requests and providing the additional resources necessary for effective Title VI enforcement.

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[4] *See* chap. 6, p. 223; chap.7, p. 258; chap. 9, pp. 356–58; chap. 10, p. 387; chap. 11, p. 421; chap. 12, p. 455.

[5] *See* chap. 6, p. 230; chap. 7, pp. 271, 284, 290, 302; chap. 8, p. 336; chap. 9, p. 365; chap. 10, p. 399; chap. 11, p. 433; chap. 12, p. 465; chap. 13, p. 487; chap. 14, p. 512.

[6] *See* chap. 6, pp. 219–20; chap. 8, pp. 326, 330–31; chap. 10, pp. 386, 387–89; chap. 11, pp. 424–25, 439–39; chap. 13, pp. 479–82.

## Federal Programs

**Finding:** The 10 Federal agencies[7] and 10 subagencies[8] reviewed in chapters 5 through 14 conduct and/or provide Federal assistance for a variety of programs. Those programs include State-administered block grant programs,[9] loan programs,[10] public-owned or operated housing programs,[11] technical assistance programs,[12] food assistance programs,[13] health-related programs,[14] and environmental justice programs,[15] among many others. Because these programs differ in their administration and operation, an adequate Title VI implementation and enforcement program requires a thorough understanding of the practical applications and purposes of the programs. It also requires a comprehensive knowledge of the potential and actual individuals, entities, and communities served or affected by the programs.

However, based on the information provided to the Commission, only one agency[16] reviewed in this report provides briefings on its federally assisted programs in its staff training program. A number of agencies[17] tailor their Title VI-related regulations, guidelines, and procedural manuals

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[7] The U.S. Department of Education (hereafter cited as DOEd); the U.S. Department of Health and Human Services (hereafter cited as HHS); the U.S. Department of Agriculture (hereafter cited as USDA); the U.S. Department of Housing and Urban Development (hereafter cited as HUD); the U.S. Department of Labor (hereafter cited as DOL); the U.S. Department of Interior (hereafter cited as DOI); the U.S. Environmental Protection Agency (hereafter cited as EPA); the Small Business Administration (hereafter cited as SBA); the Office of Justice Programs within the U.S. Department of Justice (hereafter cited as OJP); and the U.S. Department of Transportation (hereafter cited as DOT).

[8] Within USDA, the Food and Nutrition Service (hereafter cited as FNS); the Farmers Home Administration (hereafter cited as FmHA); and the Soil Conservation Service (hereafter cited as SCS). Within DOT, the Federal Aviation Administration (hereafter cited as FAA); the Federal Highway Administration (hereafter cited as FHWA); the Federal Railroad Administration (hereafter cited as FRA); the Federal Transit Administration (hereafter cited as FTA); the National Highway Traffic Safety Administration (hereafter cited as NHTSA); the Research and Special Programs Administration (hereafter cited as RSPA); and the U.S. Coast Guard (hereafter cited as USCG).

[9] *See* DOEd, chap. 5, pp. 185–86; HHS, chap. 6, p. 218; FNS, chap. 7, pp. 273–75; HUD, chap. 8, p. 325;

[10] *See* DOEd, chap. 5, p. 186; FmHA, chap. 7, pp. 292–94; DOI, chap. 10, pp. 385–86; EPA, chap. 11, p. 415; SBA, chap. 12, p. 453.

[11] *See* FmHA, chap. 7, pp. 292–94.

[12] *See* chap. 7, p. 293

[13] *See* FNS, chap. 7, pp. 273–74.

[14] *See* HHS, chap. 6, p. 218.

[15] *See* OJP, chap. 13, pp. 478–79.

[16] DOL, chap. 9, p. 353.

[17] DOEd, chap. 5, p. 193 (guidelines for its vocational education programs only ); HHS, chap. 6, p. 224 (procedures concerning block grants); HUD, chap. 8, p. 332 (guidance notices on HOME investment partnerships program, comprehensive housing affordability strategy, the community development block grant program, the HOPE for homeownership programs, and the section 811 supportive housing for persons with disabilities program; technical guidance memoranda, manuals, and handbooks on program-specific procedures); DOL, chap. 9, pp. 359–61 (JTPA regulations; guidebooks for JTPA programs, Jobs Corps, and State employment security agencies); FNS, chap. 7, pp. 278–79; DOI, chap. 10, p. 393 (guidelines for the land and water conservation fund program, the national register program, the Bureau of Land Management's federally assisted programs).

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to specific programs. However, only three[18] of the agencies that fund State-administered programs provide States with guidance on their enforcement responsibilities. Most agencies and subagencies' Title VI programs do not adequately inform their civil rights staffs about the intricacies of the federally assisted programs and how those aspects affect Title VI implementation and enforcement efforts.[19] The need for program-specific knowledge has become important especially as the New Federalism philosophy has changed the way many Federal programs operate. Increasingly, Congress has created or transformed Federal programs from individual-entitlement or federally run programs into State- or local-administered ones. The civil rights staffs within the Federal agencies require a full understanding of how these programs operate to modify regulations, policy, procedures, and civil rights enforcement activities. Otherwise, the Federal Government will be ill-equipped to identify discrimination in these federally funded programs.

**Recommendation:** Federal agencies should include in their civil rights staff training and technical assistance programs instruction on how federally assisted and conducted programs operate. The instruction should be structured so that civil rights staffs gain a full understanding of how individuals and entities are served and affected by various federally assisted programs. The agencies should consider coordinating some aspects of their training programs for civil rights and program staffs, such as general instruction on civil rights enforcement activities or civil rights laws. Coordinated training would encourage program staffs to remain mindful of civil rights considerations in their programmatic assignments. In addition, it would acquaint civil rights staffs with the practical workings of program operations. The training also would benefit Title VI enforcement programs at those agencies that rely more heavily on desk-audit than on onsite reviews. If civil rights staffs are accustomed to reviewing program operations for civil rights compliance on paper, then detailed instructions on program operations will make desk-audit reviews more meaningful. The Federal agencies also should include comprehensive explanations of how civil rights compliance requirements and procedures relate to the workings of programs through guidelines and in regulations and procedures. Finally, in planning enforcement activities and allocating limited civil rights resources, agencies should assess thoroughly how programs function and consider which entities at all levels administer the programs. The agencies should tailor their civil rights enforcement programs based on these assessments.

**Finding:** Since at least the 1970s, Congress has channeled Federal funds through States to ultimate recipients of the Federal financial assistance. Many of the funding programs Congress authorizes are continuing programs administered by the States, and increasingly Congress distributes Federal funding through block grant programs. Continuing State programs require a different approach to Title VI enforcement than categorical grant and other programs administered by the Federal agencies. Because States administer these programs, they also assume responsibility for ensuring compliance by their subrecipients with Title VI.[20]

The Federal agencies remain ultimately responsible for enforcing Title VI for these programs and overseeing States' compliance efforts. However, the Federal agencies have done little to alter their approach to Title VI enforcement as the nature of Federal financial assistance programs has changed. The Federal agencies generally have failed to issue regulations, guidelines, or procedures detailing the relative responsibilities for Title VI compliance and enforcement of the States and the Federal Government. Furthermore, the Federal agencies have made virtually no effort to monitor States' compliance with Title VI or to ensure that States' monitor effectively the compliance of their subrecipients. Therefore, although continuing State programs are increasingly the predominant mechanism for Federal financial assistance programs, Federal agencies have abrogated their responsibility to oversee and monitor compliance with Title VI of State agencies and their subrecipients. As a result, the Federal Government currently has no effective mechanism in place to ensure nondiscrimination in federally assisted programs administered at the State and local levels.

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[18] DOEd, chap. 5, p. 193 (guidelines, but only for vocational education programs); DOL, chap. 9, pp. 360–61, 368–69 (guidebook for State employment security agencies; training materials developed for States; regulations and guidelines on JTPA); DOI, chap. 10, p. 393 (guidelines for land and water conservation fund). *See* discussion on pp. 665–67 of this chapter under "Oversight of State Continuing Programs."

[19] At least one agency, EPA, reported that it assigned three attorneys with significant program expertise to its office responsible for enforcing Title VI. *See* chap. 14, pp. 509–510.

[20] *See* chap. 4, pp. 178–80.

**Recommendation:** Both Congress and the President, through the Attorney General and the Federal agencies, should make a strong commitment to ensuring that Title VI is enforced in all federally funded programs, including those administered by the States. As Congress continues to consider enacting new block grant programs, Congress should ensure that it provides the necessary mechanisms and resources for effective Title VI enforcement for these programs. Each statute creating a block grant program should contain nondiscrimination provisions similar to those in Title VI and explicitly authorize the Federal agencies to oversee and monitor States' compliance with Title VI. Congress should also provide the Federal agencies with explicit fund deferral, suspension, and termination authority to enforce Title VI in block grant programs. Congress should provide the Federal agencies' civil rights offices with sufficient resources to conduct effective oversight and monitoring of States' Title VI compliance programs. Finally, Congress should use its oversight authority over the Federal agencies to ensure that the Federal agencies conduct effective oversight and monitoring of the States.

The Attorney General, through the Coordination and Review Section, should take a leadership role in ensuring that the Federal agencies provide effective oversight and monitoring to States operating continuing State programs, including block grant programs. The Coordination and Review Section should provide the Federal agencies with model regulations, guidelines, and procedures for block grant and other continuing State programs and should monitor the Federal agencies' oversight and monitoring of State agencies.

Each Federal agency should update its regulations and issue guidelines and procedures for continuing State programs, including block grant programs. The guidelines and procedures should detail explicitly the relative responsibilities of State agencies and the Federal Government in ensuring Title VI compliance for continuing State programs. The Federal agencies should require State agencies to develop and submit for approval methods of administration showing how they intend to ensure that they and their subrecipients are in compliance with Title VI, and to prepare and submit annual reports on their Title VI activities. The Federal agencies should review these reports annually and, in addition, conduct periodic onsite audits of the States to assess their Title VI compliance and the compliance of their subrecipients and to provide them with technical assistance. To the extent that effective oversight and monitoring of State programs require additional resources, the Federal agencies should, through their annual budget planning, request such resources.

## Federal Agencies' Civil Rights Enforcement Programs and the Statutes They Enforce

**Finding:** As the Federal Government undergoes the National Performance Review, it risks placing streamlining and downsizing of Government ahead of its commitment to eradicate discrimination in federally assisted programs. For instance, the Department of Justice cited the National Performance Review as the reason for suspending efforts to develop a revised model Title VI regulation. Furthermore, the Federal agencies have taken the National Performance Review's emphasis on downsizing as a mandate to decrease the budget and staffing of the offices charged with civil rights enforcement. As a result, although the size of most civil rights offices diminished from 1975 to the present while other Federal Government offices expanded, Federal agencies have not exempted civil rights offices from downsizing under the National Performance Review. Civil rights offices are slated to undergo further budget reductions, even though most Federal agencies have not conducted formal analyses of the impact these decreases will have on their civil rights implementation, compliance, and enforcement programs.[21]

**Recommendation:** To conduct effective Title VI enforcement, the Federal agencies should assess their current use of existing resources and, based on those assessments, allocate resources to maximize their Title VI implementation, compliance, and enforcement efforts. Each civil rights office should engage in a formal self-evaluation to ensure that it uses its limited resources effectively and efficiently and to provide a thorough justification for any new resources it requests. Before subjecting agencies' civil rights offices to downsizing under the National Performance Review, the President should allow Federal agencies' civil rights offices time to analyze their current Title VI enforcement programs, adjust allocation of resources as necessary, and determine the need for existing or increased resources to civil rights activities based on those assessments and adjustments. If the evaluations by those civil rights offices demonstrate that existing or increased resources are essential to their Title VI enforcement programs, the President should exempt those agencies' civil rights offices from downsizing under the National Performance Review.

**Finding:** The Federal agencies reviewed in this report enforce a variety of civil rights statutes and program-related statutes that contain civil rights provisions. The agencies enforce some or all of the major civil rights statutes applying to federally assisted and federally conducted programs, namely: section 504 of the Rehabilitation Act of 1973,[22] the Age Discrimination Act of 1975[23] Title IX of the Education Amendments of 1972,[24] the Americans with Disabilities Act,[25] and Title VI of the Civil Rights Act of 1964.[26] However, agencies also may enforce civil rights provisions within statutes that implement the agencies' federally assisted and conducted programs.[27] Consequently, some agencies' civil rights enforcement offices may confront larger responsibilities and workloads than others depending on the number of programs they administer or fund, the number of statutes they enforce, and the specific requirements in those statutes. For example, the Department of Education reported that it enforces only the five traditional civil rights statutes for its 230 federally assisted and federally conducted programs that serve nearly 24,000 recipients.[28] However, the Department of Health and Human Services enforces 11 civil rights-related statutes for its 210 federally assisted and conducted programs serving 700,000 recipients.[29] In addition to the five major civil rights statutes involving federally assisted and conducted programs, it identified six program-related statutes, including Titles VI, VII, VIII, and XVI of the Public Health Service

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[21] *See* chap. 3, p. 75; chap 5, p. 190; chap. 10, pp. 388–89.

[22] 29 U.S.C. § 794 (1988 & Supp. V 1993).

[23] 42 U.S.C. §§ 6101–6107 (1988).

[24] 20 U.S.C. §§ 1681–1688 (1988).

[25] 42 U.S.C. §§ 12,131–12,134 (Supp. V 1993).

[26] Pub. L. No. 88–352, 78 Stat. 252 (codified as amended at 42 U.S.C. §§ 2000d to 2000d-7 (1988)).

[27] The Department of Agriculture identified five statutes, in addition to Title VI. The Department of Housing and Urban Development reported seven statutes. The Department of Labor named four of such statutes. The Department of Interior listed three statutes. The Environmental Protection Agency identified five statutes. The Small Business Administration listed 12 statutes. The Office of Justice Program within the Department of Justice identified seven statutes.

[28] *See* chap. 5, p. 186.

[29] *See* chap. 6, p. 219.

Act;[30] section 407 of the Drug Abuse Treatment Act of 1972;[31] section 321 of the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970;[32] and the nondiscrimination provisions of the Omnibus Budget Reconciliation Act of 1981.[33]

**Recommendation:** To ensure that all Federal agencies use their civil rights enforcement resources efficiently, agencies should consolidate efforts when possible. For example, agencies should pool resources to sponsor governmentwide staff training on compliance or enforcement activities for the major civil rights statutes. This training also will serve as an opportunity to instruct staffs on and clarify developments involving the major civil rights laws. In a similar fashion, agencies should use joint efforts in providing outreach and education and technical assistance. Agencies should organize regional or local conferences or workshops that present general information on rights and responsibilities under all the major civil rights statutes, including Title VI . These consolidated activities should not replace individual agency staff training, outreach and education, and technical assistance programs that are specific to the types of Federal programs under the jurisdiction of that agency. However, by allowing agencies to pool resources, joint efforts would permit agencies to streamline governmentwide expenditure of resources on civil rights enforcement programs and promote a consistent understanding of quality compliance and enforcement activities. The Department of Justice should assist in the coordination of these efforts, not only for the purposes of streamlining government, but also to ensure that agencies' civil rights staffs receive quality training and comprehensive instruction and that the needs of recipients, beneficiaries, program participants, and others are met.

**Finding:** In some cases, agencies' federally assisted and conducted programs provide assistance to a common State or local agency or recipient. Because all agencies enforce most of the five traditional civil rights statutes, namely, Title VI, Title IX, section 504 of the Rehabilitation Act, the Americans with Disabilities Act, and the Age Discrimination Act,[34] an overlap in civil rights enforcement efforts and responsibilities can result. Two agencies may conduct compliance and enforcement activities for the same State agency, and that State agency may confront dual responsibilities in ensuring compliance with Title VI. To alleviate this overlap and increase efficient use of often limited resources, some agencies[35] have executed delegation agreements giving one agency responsibility for conducting enforcement activities for the common agency or recipient.

**Recommendation:** The Federal agencies should maintain a database of information so that they can identify all instances in which civil rights enforcement efforts and responsibilities overlap with respect to a common State or local recipient. Once they recognize areas of overlap, the agencies should rely on interagency agreements, memoranda of understanding, and other types of delegation agreements to permit efficient allocation and use of resources. Before an agency delegates any of its Title VI responsibilities for a federally assisted program, it must ensure that the agency assuming responsibility has an adequate Title VI enforcement program in place. The Department of Justice must establish minimum criteria in assessing the adequacy of a Title VI program. In particular, an adequate Title VI program should meet the requirements of the Department of Justice's coordination regulations and contain all key elements to ensure Title VI compliance. The delegating agency should consult with the Department of Justice to determine if an agency has an adequate Title VI enforcement program. Once that determination is made, the agency should formally delegate its Title VI responsibilities for a particular program.

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[30] 42 U.S.C. §§ 201-300aaa-13 (1988 & Supp. V 1993).

[31] 21 U.S.C. § 1101 (1988).

[32] 42 U.S.C. §§ 218, 246, 2688h, 2688j-2, 2688t, 4551, 4552, 4561, 4571, 4581, 4582, 4591 to 4593 (1988).

[33] Pub. L. No. 97–35, 95 Stat. 357 (codified as amended in scattered sections of U.S.C.).

[34] Not all Federal agencies enforce Title IX because that statute prohibits discrimination on the basis of sex "under any *education* program or activity receiving Federal financial assistance." 20 U.S.C. §§ 1681-1688 (1988) (emphasis added). The other civil rights statutes do not limit explicitly the type of program or activity to education. *See* 29 U.S.C. § 794 (1988 & Supp. V 1993); 42 U.S.C. §§ 6101-6107 (1988); 42 U.S.C. §§ 12,131-12,134 (Supp. V 1993); and 42 U.S.C. §§ 2000d to 2000d-7 (1988).

[35] SBA, chap. 12, p. 465 (proposed delegation agreements with DOEd and HHS); FTA, chap. 14, p. 575 (memorandum of understanding with FHWA).

The formal agreements should specify clearly the State or local recipient's obligations. Since these obligations will involve different Federal programs, all agencies entering the agreement should provide detailed input on the information that the recipient must collect and forward to the Federal agency and the type of guidance that the recipient requires to perform Title VI compliance and enforcement activities. If a Federal agency finds a recipient in noncompliance with Title VI or engaged in discriminatory practices, the agency should inform all parties to the delegation agreement or memorandum of understanding. Also, the agency should consult with those other agencies that are party to the delegation agreement on corrective strategies, remedial actions, or consideration of sanctions. The procedures for interagency communication and consultation should be specified clearly in the formal agreement or memorandum.

## Organization, Budget, Staffing, and Workload

### Organization

The effectiveness of the organization of agencies' civil rights enforcement function varies considerably from agency to agency.[36] Only one of the agencies reviewed, the Department of Education, has an organizational structure that meets all the necessary criteria discussed in chapter 4 and listed in the Department of Justice's "Checklist for Analysis of a Federal Agency's Title VI Enforcement Effort."[37] These criteria include:

- organizational placement of the primary civil rights office to ensure primacy;
- organizational and managerial links between the primary civil rights office and the regional and field offices;
- sufficient authority given to the primary civil rights office;
- separation of internal civil rights functions from external civil rights functions and Title VI enforcement responsibilities;
- coordination between the primary civil rights office and program offices; and
- a unit within the primary civil rights office devoted exclusively to policy and planning.[38]

### *Organizational Placement of the Primary Civil Rights Office*

**Finding:** In five of the Federal agencies reviewed in chapters 5 through 14,[39] civil rights enforcement is demonstrably given priority because the head of the civil rights office reports directly to the head of the agency. This reporting structure allows the director of the primary civil rights office

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[36] *See* table 15.1.

[37] U.S. Department of Justice, Civil Rights Division, "Checklist for Analysis of a Federal Agency's Title VI Enforcement Effort," *Title VI Forum*, vol. 4, no. 2 (Fall 1979), pp. 9–11 (hereafter cited as DOJ Title VI Checklist).

[38] *See* chap. 4, pp. 14–20. *See also* table 15.1.

[39] DOEd, chap. 5, p. 186; HHS, chap. 6, p. 219; HUD, chap. 8, p. 326, 5; EPA, chap. 11, p. 418 (officially, the Director reports to the EPA Administrator, but for daily routine matters, the Director reports to EPA's Deputy Chief of Staff who is two levels removed from the Administrator); SBA, chap. 12, pp. 453–54; DOT, chap. 14, p. 507. Of the subagencies and modal administrations, FmHA, chap. 7, p. 253; FAA, chap. 14, pp. 523–24; FHWA, chap. 14, pp. 539–40 (The Director of FHWA/OCR reports formally to the Executive Director, but in practice to the Administrator.); RSPA, chap. 14, p. 591. *See* table 15.1.

## TABLE 15.1
## Organizational Structure of Federal Agencies' External Civil Rights Enforcement

| | Primary civil rights office (federally assisted programs) | Head of civil rights office | Centralized or decentralized enforcement | Internal & external civil rights enforcement in different offices | Regional offices offices involved in civil rights enforcement | Regional staff report to head of civil rights office | Use collateral duty or other nontrained personnel in civil rights enforcement | |
|---|---|---|---|---|---|---|---|---|
| DOE | Office of Civil Rights (OCR) | Assistant Secretary; reports to Secretary | Centralized | Yes | Yes | Yes | No | |
| HHS | Office of Civil Rights (OCR) | Director; reports to Secretary | Partially | Yes decentralized[1] | Yes | Yes | OCR, no; some operating divisions, yes. | |
| USDA | Office of Civil Rights Enforcement (OCRE) | Director; reports to Assistant Secretary for Administration | Decentralized | No | NA | NA | NA | |
| FNS | Civil Rights Division (CRD) | Director; reports to Deputy Administrator for Management | NA | No | Yes | | No | No |
| FMHA | Equal Opportunity Staff (EOS) | Director; reports to Administrator | NA | No | Yes[2] | | No | Yes |
| SCS | Civil Rights and Program Compliance Division | Director; reports to Deputy Chief for Programs | NA | Yes | Yes[3] | | No | Yes |
| HUD | Office of Fair Housing and Equal Opportunity (FHEO) | Assistant Secretary; reports to Secretary | Centralized | Yes | Yes | | Yes[4] | No |

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[1] HHS indicated that its operating divisions have some Title VI responsibilities. However, none of the Operating Divisions that provided the Commission with survey responses has a separate civil rights office for external civil rights compliance. *See* chap. 6, p. 4.

[2] State offices.

[3] State conservationists.

[4] Since July 1994.

*(continued)*

**TABLE 15.1 (continued)**
**Organizational Structure of Federal Agencies' External Civil Rights Enforcement**

| | Primary civil rights office (federally assisted programs) | Head of civil rights office | Centralized or decentralized enforcement | Internal & external civil rights enforcement in different offices | Regional offices offices involved in civil rights enforcement | Regional staff report to head of civil rights office | Use collateral-duty or other nontrained personnel in civil rights enforcement |
|---|---|---|---|---|---|---|---|
| DOL | Directorate of Civil Rights (DCR) | Director; reports to Assistant Secretary for Adm. & Mgmt. | Centralized | No, but separate units | No[5] | NA | No |
| DOI | Office for Equal Opportunity (OEO) | Director; reports to Deputy Assistant Secretary for Human Resources | Decentralized | No, but separate units | NA | NA | NA |
| NPS | Equal Opportunity Program | NA | | NA | | | Yes |
| FWS | Office for Human Resources | NA | | NA | | | Yes |
| BR | NA | | NA | | NA | | Yes |
| EPA | Office of Rights Rights (OCR) | Director; reports to Administrator[6] | Centralized | No | Yes | No | No |
| SBA | Office of Equal Employment Opportunity and Civil Rights Compliance (OEEO&C) | Asst. Administrator for Equal Employment Opportunity;[7] reports to Administrator | | Centralized | No, but separate units | No, but staff in central office duty stations | NA No |

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[5] For external civil rights enforcement functions.
[6] For daily routine matters, reports to EPA's Deputy Chief of Staff.
[7] Since October 1984.

*(continued)*

**TABLE 15.1 (continued)**
**Organizational Structure of Federal Agencies' External Civil Rights Enforcement**

| | Primary civil rights office (federally assisted programs) | Head of civil rights office | Centralized or decentralized enforcement | Internal & external civil rights enforcement in different offices | Regional offices offices involved in civil rights enforcement | Regional staff report to head of civil rights office | Use collateral-duty or other nontrained personnel in civil rights enforcement | |
|---|---|---|---|---|---|---|---|---|
| OJP | Office of Civil Rights (OCR) | Director; reports to Deputy Asst. Attorney General of OJP | Centralized | Yes[7] | No | | NA | No |
| DOT | Office of Civil Rights (OCR) | Director; reports to Secretary | Decentralized | No | | | | |
| FAA | Office of Civil Rights (OCR) | Assistant Administrator; reports to Administrator | | NA | No | Yes | No | No |
| FHWA | Office of Civil Rights (OCR) | Director; reports to Executive Director | NA | No | Yes | | No | Yes |
| FRA | Office of Civil Rights (OCR) | Director; reports to Office of Special Staff | NA | No | No | | NA | No |
| FTA | Office of Civil Rights (OCR) | Director; reports to Administrator | NA | No | Yes | | Yes | NA |
| NHTSA | Office of Civil Rights (OCR) | Director; reports to Deputy Administrator | NA | No | No | | NA | No |
| RSPA | Office of Civil Rights (OCR) | Director; reports to Administrator | NA | No | No | | NA | No |
| USCG | Office of Civil Rights (OCR) | Chief; reports to Vice Commandant | | NA | No, but separate units | Yes | NA | Yes |

to ensure that the agency places prominence on civil rights matters, particularly administrative decisions such as allocation of budget and staffing and the agency's official statements on policy. In the other agencies, the heads of the civil rights offices are several links down in the chain of command.[40] Consequently, the head of the primary civil rights office does not have direct contact with the head of the agency and has less direct influence on important resource and policy meetings and decisions.

**Recommendation:** In those agencies in which the head of the primary civil rights office does not report directly to the agency head, agencies should ensure that the policy concerns and resource needs of the civil rights office remain at the forefront of the agency policy and administrative decisions. In all Federal agencies, the Secretary or agency administrator should ensure that civil rights enforcement efforts are neither forgotten nor neglected and that civil rights enforcement concerns become an integrated part of the agency's program, planning, and administrative operations. The Secretary or administrator should provide direct leadership through policy pronouncements and ensure vigorous enforcement of civil rights laws at all levels—headquarters, regional, and field. Only with full, continuous, and sustained leadership and support of the agency head will agencies' civil rights enforcement efforts receive the prominence they deserve. This will enable agencies to fulfill their constitutional and statutory mandates to ensure nondiscrimination in Federal programs.

### *The Primary Civil Rights Office: Regional and Field Offices and Authority Within the Agency*

**Finding:** In some of the Federal agencies reviewed by the Commission,[41] civil rights staff members are placed within the regional, field, or State program offices. They report to a regional director who, in turn, serves as the link between the field and regional civil rights staff and the headquarters civil rights office.[42] This arrangement may impede efficient operation and direction of enforcement activities, especially if the agency holds the regional head accountable only for programmatic operations and not for the civil rights activities performed by regional and field staff.

The Department of Education[43] is an example of an agency with direct control and oversight of its Title VI enforcement program. It is effective in coordinating and directing the efforts of its primary civil rights office and regional offices that conduct the majority of the Department's routine Title VI enforcement activities, such as complaint investigations and compliance reviews. The Department of Education's regional offices are separate and distinct from the regional program offices that implement federally assisted programs. Its regional civil rights enforcement offices are subdivisions of the Department's Office for Civil Rights. The Department of Education has an immediate office within its primary civil rights office responsible for management and operations of the regional offices. The regional directors report to officials within the primary headquarters Office for Civil Rights.[44] To this extent, the Department is more effective than many of the other Federal agencies in ensuring that the primary civil rights office has authority over all civil rights activities within the agency. This structure enables the Director of the Office for Civil Rights to oversee and manage all Title VI efforts.

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[40] USDA, chap. 7, pp. 256–58; DOL, chap. 9, pp. 355–59; DOI, chap. 10, pp. 391–92; OJP, chap. 13, pp. 479–82. Of the subagencies and modal administrations, FNS, chap. 7, p. 278; SCS, chap. 7, p. 312; NHTSA, chap. 14, p. 582; FRA, chap. 14, p. 562; USCG, chap. 14, p. 549. *See* table 15.1.

[41] *See* FmHA, chap. 7, pp. 295–96; SCS, chap. 7, p. 311; EPA, chap. 11, pp. 419–21 (although the EPA places its regional civil rights staff in the same office as program staff, it does not have regional program staff conduct civil rights activities as a collateral duty); FHWA, chap. 14, p. 540; USCG, chap 14, p. 599.

[42] FNS, chap. 7, p. 276; FmHA, chap. 7, pp. 295–96.

[43] *See* chap. 5, p. 186.

**Recommendation:** To ensure that civil rights enforcement efforts are consistent and coordinated, the Federal agencies should consider the organizational structure of the Department of Education. They should adapt their organization to that model as appropriate for their civil rights enforcement programs. This arrangement ensures that the primary civil rights office has complete authority over civil rights enforcement efforts at all levels agencywide.

However, the Commission recognizes that existing budget and staff resources severely limit the feasibility of independent civil rights offices at every level of enforcement. Therefore, at a minimum, agencies must develop streamlined civil rights enforcement programs in which the primary civil rights office has overall and ultimate authority on all civil rights matters. At each level, civil rights staff must report to an individual who will be held responsible for ensuring that staff perform their civil rights functions. That individual should report to a higher level civil rights director on performance of civil rights enforcement activities.

**Finding:** Three of the Federal agencies reviewed[45] have decentralized civil rights enforcement programs. Although the primary civil rights offices within these agencies may have some direct Title VI enforcement responsibilities,[46] these offices, for the most part, have the responsibility for ensuring that subagencies perform their Title VI enforcement activities. However, they have little, if any, direct authority over the headquarters or regional civil rights offices in the subagencies. For example, the heads of the civil rights offices within the Food and Nutrition Service, the Farmers Home Administration, and the Soil Conservation Service report to an official within their respective agencies, rather than to the Department of Agriculture's Office of Civil Rights Enforcement.[47] Similarly, the heads of the civil rights offices within the Department of Transportation's modal administrations report to officials within the modal administrations, rather than the Department of Transportation's Office of Civil Rights. Furthermore, the regional and field staff in the agency heads, bureaus, or modal administrations do not report directly to the primary civil rights enforcement office of their subagency or agency. Instead, they report to a regional director, administrator, or chief who may not be held accountable for the civil rights activities of these staffs.[48]

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[44] Within the Department of Education's Office of the Assistant Secretary for Civil Rights, an Executive Operations Staff directs and coordinates the regional offices. The regional directors report to the Deputy Assistant Secretary for Civil Rights. U.S. Department of Education, "Office for Civil Rights," pp. 2–3 (undated) (hereafter cited as "Office for Civil Rights). *See* chap. 5, pp. 186–88. Within the Department of Health and Human Services, Office of Civil Rights, the Office of Program Operations provides operational direction to the regional offices who report to the head of that office. HHS FY 1990 Implementation Plan, section I.D., p. 4. *See* chap. 6, pp. 219–20.

[45] USDA, chap. 7, pp. 253–55; DOI, chap. 10, pp. 387–90; and DOT, chap. 14, p. 501. *See* table 15.1. HHS' Title VI program is at least partially decentralized. HHS indicated that its operating divisions have some Title VI responsibilities, although the Commission found no evidence that the operating divisions maintained independent civil rights enforcement offices. *See* chap. 6, p. 219.

[46] The Department of Agriculture's Office of Civil Rights Enforcement conducts the final investigations and issues determinations of violation or compliance. USDA/OCRE Survey, Q. 25(I),(k), p. 19. *See* chap. 7, pp. 253–54. The Department of Transportation's Office of Civil Rights has the ultimate responsibility for investigating complaints. DOT/OS Survey, Q. 25(j), p. 19. *See* chap. 14, pp. 501–02.

[47] The Acting Director of the Farmers Home Administration's headquarters civil rights office expressed a desire for closer contact with the Department of Agriculture's Office of Civil Rights Enforcement (OCRE), in particular, for more oversight by OCRE. Prejean-Greaux interview, p. 4. *See* chap. 7, pp. 300–01.

**Recommendation:** For decentralized civil rights enforcement programs, each subagency's primary civil rights director should rely on the agency's primary civil rights office for direction. This arrangement should not hinder the subagency head's ability to direct the affairs of the subagency. However, on civil rights enforcement matters, the agency's primary civil rights office should oversee, direct, and coordinate civil rights functions. In the alternative, Federal agencies with decentralized civil rights enforcement programs should consider centralizing their civil rights enforcement activities relating to federally assisted and federally conducted programs in the agencies' primary civil rights offices.[49]

**Finding:** To ensure that agencywide civil rights enforcement efforts identify and eliminate discrimination to the maximum extent possible, organization within an agency's primary civil rights office is important. The Department of Agriculture's Compliance and Enforcement Division within the Office of Civil Rights Enforcement has three components to address the different areas of external civil rights enforcement. The Program Complaints Adjudication unit oversees complaints processing with respect to federally assisted and conducted programs. The Evaluation and Investigation unit establishes compliance standards, monitors and evaluates the agency heads' civil rights enforcement programs, and conducts all onsite complaint investigations. The Policy and Planning unit is responsible for policy and planning of civil rights enforcement activities; it develops civil rights training programs and materials for staff agencywide; and it provides technical assistance to the agency heads.[50] Similarly, as part of its reorganization plan, the Department of Transportation proposed creating divisions in its departmental civil rights organized by similar topic areas.[51] These types of organizational structures are conducive to the role of agencies' primary civil rights offices in performing oversight, coordination, and monitoring. They allow each unit to concentrate on a specific area of civil rights enforcement and to develop active programs.

Furthermore, the Department of Transportation has proposed including in its reorganized structure a division of data and evaluation.[52] Units devoted exclusively to data collection and evaluations are rare among the Federal agencies to the detriment of their civil rights enforcement programs. Comprehensive and well-maintained data collection and analysis programs would enable Federal agencies to maintain histories on their civil rights enforcement efforts and on their State and local recipients' civil rights compliance records, a feature that would enhance the effectiveness of preaward desk-audit reviews.

**Recommendation:** The agency's primary civil rights office should be structured into divisional units based on the types of activities. A policy unit should communicate regularly with subagencies to identify issues of concern, and it should disseminate to the subagencies and compile the agency's policy statements and letters of finding on particular issues. A planning unit should coordinate workshops with the subagencies to ensure that the subagencies plan and conduct their civil rights enforcement programs with both efficiency and effectiveness as key focuses. An evaluation or investigations unit should conduct all performance evaluations, onsite reviews, and investigations of subagencies' civil rights enforcement programs. A data collection and analysis unit should be the agency's data bank on civil rights enforcement so that it can provide information to other Federal agencies to identify the need for interagency or delegation agreements and to assist in compiling information on State and local recipients' civil rights compliance records.

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[48] Within the Department of Agriculture, FNS, chap. 7, p. 276; FMHA, chap. 7, p. 296; SCS, chap. 7, p. 311. The Department of Transportation (FAA, FHWA); chap. 14, pp. 502, 523–24, 537–40.

[49] In assessing the civil rights enforcement efforts of the Department of Transportation, a task force formed at the request of Secretary of Transportation Federico Peña in December 1993 made this same recommendation. Congress disagreed and approved only a consolidation of internal civil rights activities within the headquarters office of the Department of Transportation. *See* chap. 14, pp. 502–05.

[50] *See* chap. 7, p. 254.

[51] *See* chap. 14, p. 503.

[52] *See* chap. 14, p. 503.

### *Internal and External Civil Rights Functions and Title VI Enforcement Responsibilities*

**Finding:** Agencies that place internal (Title VII and equal employment opportunity) and external (Title VI and other laws regarding federally assisted or conducted programs) civil rights responsibilities within the same office risk compromising their Title VI enforcement efforts. If the agency's workload in internal matters increases, the agency may divert budget and staff resources away from external civil rights matters. Also, the activities involved in internal and external civil rights enforcement differ. Consequently, consolidation of the functions may prevent specialization of staff in specific civil rights laws and enforcement activities, and the agency may overlook the specific budget and staffing resource needs for external civil rights enforcement. Some agencies with internal and external civil rights in one office have addressed these problems by creating separate divisions for internal and external activities.[53] However, two agencies[54] and six modal administrations[55] within the Department of Transportation maintain primary civil rights offices that perform both internal and external civil rights enforcement activities with no organizational division of these functions. Four of the Federal agencies[56] and one Department of Agriculture agency head[57] have separated the functions entirely into two offices. The division of external and internal civil rights enforcement programs facilitates tracking of expenditures for external civil rights activities and monitoring of resource needs. Moreover, separation of the functions allows external civil rights staff to specialize in civil rights laws relating to federally assisted or federally conducted programs. It also increases the likelihood that civil rights staff have comprehensive knowledge and understanding of Title VI.

**Recommendation:** Internal and external civil rights enforcement functions are equally important mechanisms for ensuring nondiscrimination and protecting the rights of individuals. They should receive equal prominence within Federal agencies. However, when confronted with increasing numbers of internal Title VII and other civil rights complaints, Federal agencies should not overlook the importance of maintaining strong external civil rights enforcement programs. Although complaints of discrimination by the agencies' employees are significant concerns that require immediate attention, discrimination occurring in federally assisted and federally conducted programs affects whole communities and individuals nationwide. Agencies must maintain active external civil rights enforcement programs to prevent and address those discrimination claims. Agencies must ensure that the demands of internal civil rights enforcement functions do not affect adversely the workings of external civil rights enforcement efforts. Because none of the agencies reviewed receives funding specifically appropriated to either function, Congress places no requirement that funding for civil rights enforcement address the needs of internal and external civil rights enforcement equally or that agencies should favor one function over the other. Thus, the Federal agencies must implement mechanisms to secure sufficient prominence and resources for both functions, especially ensuring that external ciyil rights activities are not compromised.

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[53] See USDA, chap. 7, p. 253; FmHA, chap. 7, p. 295; DOL, chap. 9, pp. 355–58; DOI, chap. 10, p. 387; SBA, chap. 12, p. 454; USCG, chap. 14, p. 599. *See* table 15.1.

[54] EPA, chap. 11, pp. 420–21; DOT, chap. 14, pp. 501–02. *See* table 15.1.

[55] FAA, chap. 14, pp. 523–24; FHWA, chap. 14 pp. 539–40; FRA, chap. 14, pp. 556–57; FTA, chap. 14, pp. 567–69; NHTSA, chap. 14, p. 502; RSPA, chap. 14, pp. 591–92. *See* table 15.1.

[56] DOEd, chap. 5, pp. 186–87; HHS, chap. 6, pp. 219–20; HUD, chap. 8, p. 336; OJP, chap. 13, p. 481. *See* table 15.1.

[57] SCS, chap. 7, p. 311. *See* table 15.1.

All Federal agencies should separate their internal and external civil rights enforcement functions to ensure that neither function is compromised by an increased workload in the other. More important, agencies should maintain separate budget allocations for each function and ensure that funds are not diverted away from external civil rights enforcement programs when an agency faces increased numbers of Title VII complaints. To ensure that budget allocation decisionmaking considers the importance and needs of external civil rights enforcement, agencies should ensure that the director or chief of external civil rights enforcement participates actively in budget and staffing decisions.

### *Other Offices with Title VI/Federal Assistance Responsibility*

**Finding:** Each Federal agency's civil rights office relies on the agency's budget and resource management office to establish budget allocations and staff increases for civil rights enforcement each fiscal year. In addition, it works with or depends on the Office of General Counsel or the Office of the Solicitor to implement regulations, policies, guidelines, and procedures relating to civil rights laws. In some instances, the civil rights office delegates civil rights enforcement responsibilities to program offices.[58]

**Recommendation:** Each Federal agency should coordinate the activities of the civil rights office, program offices, legal office, and budget and resource management office so that planning and resource allocation decisions will not ignore civil rights goals and objectives. Especially in situations in which the agency's civil rights office relies on program offices to conduct some enforcement activities and on the legal office to provide all legal support, the program and legal offices should ensure that civil rights responsibilities are factored continuously into their planning efforts. The budget and resource management office should provide enough resources and funding to support both the civil rights and non-civil-rights functions of these offices. A responsible partnership and team effort must exist between all major offices in developing and accomplishing civil rights goals, objectives, and initiatives. Senior executive management officials within the various agency offices should work with the primary civil rights office director to coordinate civil right goals and objectives into their planning efforts. The Secretary should see that extensive coordination of budget and resource decisions occurs on a continuous basis between the civil rights office, program offices, legal office, and budget and resource management office concerning civil rights program needs and requirements. Coordination of civil rights enforcement efforts among the higher level officials will allow civil rights goals and objectives to become identified more readily as the Secretary's goals, objectives, and initiatives, rather than solely those of the civil rights office. In addition, civil rights enforcement will become an integrated part of all agency functions.

**Finding:** In some agencies, civil rights enforcement staff at the regional and field level receive assistance from program personnel.[59] Program personnel may have only limited civil rights training, yet they will perform Title VI enforcement activities as a collateral duty to their primary program functions.

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[58] HHS operating divisions, chap. 6, pp. 220–22; FmHA, chap. 7, pp. 296–97; SCS, chap. 7, p. 311; within DOI, NPS, FWS, and BR, chap. 10, pp. 389–90, 395–96; FHWA, chap. 14, pp. 540–41; USCG, chap. 14, p. 599.

[59] HHS (Although HHS' Office for Civil Rights consists of 10 regional offices, its operating divisions have some Title VI responsibilities. None has separate offices for external civil rights compliance, and some of them transfer duties to their grants management office.), FmHA, SCS, NPS, FWS, BR, FHWA, and USCG. *See* table 15.1 under "Use of Collateral-Duty or Other Nontrained Personnel in Civil Rights Enforcement." Within NPS, FWS, and BR, program staff perform the external civil rights enforcement responsibilities at the regional level. No external civil rights staff are located in the regional offices; rather, regional program staff work in consultation with external civil rights coordinators who are located at headquarters. *See* chap. 10, pp. 398–99.

**Recommendation:** The Federal agencies should develop regional and field offices that are subdivisions of their civil rights enforcement offices. In addition, they should assign trained civil rights staff to these offices who are devoted solely to enforcing civil rights. By having only trained civil rights staff, rather than collateral-duty program staff, performing civil rights enforcement functions, agencies will ensure that civil rights enforcement efforts are not compromised for other duties.

Although the Commission maintains that agencies should assign only trained civil rights staff to conduct external civil rights enforcement functions, it recognizes that some agencies may rely on collateral-duty program staff at the regional and field levels. If program staff have civil rights enforcement responsibilities as a collateral duty, they must receive regular and thorough training on civil rights enforcement. Program staff should perform civil rights enforcement functions with the understanding that these responsibilities are equally as important as programmatic functions. Performance standards should reflect both their program-related and civil rights enforcement duties. A headquarters, regional, or field director/coordinator with external civil rights responsibilities and training must monitor the performance of collateral-duty program staff. That director/coordinator must have the responsibility for conducting performance evaluations of collateral-duty program staff on the civil rights functions.

**Finding:** In most agencies, legal support for Title VI enforcement is provided by an Office of General Counsel or Office of the Solicitor because the civil rights offices do not have their own legal support staff.[60] Without coordination between the legal office and the primary civil rights office, the legal office may place greater priority on its routine non-civil-rights functions to the detriment of civil rights functions.[61]

The Department of Education is unique in that its Office for Civil Rights (OCR) has its own litigation staff to represent OCR in administrative litigation. More important, OCR has attorney staff within it to assist in the development and revisions to regulations, guidelines, legal standards, and policies for Title VI and other civil rights statutes relating to federally assisted programs. OCR's legal support staff review enforcement cases for legal sufficiency, develop guidance materials, and serve as the liaison to the Department's Office of General Counsel.[62] The placement of attorney staff within OCR and the existence of individual policy units within the office facilitate productive development of regulations, policy guidance, and procedures related to Title VI and promote efficient Title VI implementation and compliance.

**Recommendation:** The Federal agencies should provide some legal support staff within their primary civil rights offices who will be responsible for providing legal analysis in policymaking efforts and who will review and revise Title VI regulations to conform with new developments in the law. The attorney staff members within the civil rights enforcement office should provide the agency's legal expertise on civil rights enforcement. The legal support staff should work in consultation and as liaisons to the primary legal office of the agency, the Office of the General Counsel or Solicitor. This arrangement will allow the civil rights office to maintain full control and direction of all civil rights efforts, and it will ensure that civil rights goals and objectives are the primary focus of those regional, local, and legal staff members.

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[60] HHS, chap. 6, pp. 219-220; HUD, chap. 8, p. 326; DOI, chap. 10, p. 388 (DOI's civil rights office relies on the Office of the Solicitor for legal support.); SBA, chap. 12, p. 455. Although its civil rights office does not have its own legal staff, the Department of Labor Solicitor's Office provides not only legal support but also has litigation authority with respect to Title VI.

[61] For example, the SBA's civil rights office indicated that it has been unable to complete planned revisions to its Title VI regulations and standard operating procedures because of its reliance on the Office of General Counsel and that office's failure to perform the revisions. *See* chap. 12, pp. 457–58.

[62] *See* chap. 5, pp. 187–88.

### Policy and Planning Within the Civil Rights Office

**Finding:** The Department of Education has been the most active of the Federal agencies in issuing policy statements. The Department's organization of its Office for Civil Rights explains its success in producing policy and program guidance. The Department of Education's OCR has a policy, enforcement, and program service that oversees all aspects of the Department's policy development and dissemination.[63] The existence of this service ensures that the Department of Education does not overlook its responsibility to issue policy guidance on Title VI. Other Federal agencies reviewed in chapters 5 through 14 have staff or offices devoted to policy development,[64] although most agencies are considerably less active than the Department of Education in issuing policy guidance.

**Recommendation:** The Federal agencies should organize within their primary civil rights office a distinct policy unit. At least one attorney staff member should be assigned to that unit to provide legal support. This unit should have responsibility for compiling and maintaining the agency's policy statements and decisions and for coordinating policy development. This unit would direct and monitor regional and field civil rights staff members' efforts at identifying local level issues that require the agency's policy guidance.

**Finding**: In addition to a policy enforcement and program unit, the Department of Education's headquarters OCR has a service responsible for OCR's operational planning, development of fiscal year goals and objectives, and evaluation of OCR's efficiency and effectiveness at meeting these goals. This service also maintains OCR's information systems and is responsible for its civil rights surveys.[65] Through this service, the Department of Education developed the first National Enforcement Strategy and its successor, the Strategic Plan. These plans served as management tools to maximize resource use and increase efficiency within OCR. They also set goals and directions for OCR to assist in future planning. They prompted the Department of Health and Human Services to develop its own strategic plan. OCR's planning and development unit helps to ensure that the Department of Education does not neglect its Title VI responsibilities with respect to operational planning. In addition, it facilitates the improvement of the Department's Title VI enforcement program by placing emphasis not only on existing obligations but also future goals and objectives. None of the other agencies reviewed indicated that it has active planning divisions or units that concentrate on developing the civil rights enforcement program in light of existing needs, limited resources, and civil rights developments.

**Recommendation:** The Federal agencies should have a division within primary civil rights offices devoted exclusively to strategic planning of Federal civil rights enforcement efforts. This division should have primary responsibility for conducting the self-assessments of the civil rights enforcement program. This division should develop fiscal year goals and objectives and conduct ongoing efficiency and effectiveness evaluations. It should maintain a database that tracks program expenditures for enforcement of each civil rights law, including budget and staff allocations and funding for each type of implementation, compliance, or enforcement activity. The planning division also should be responsible for submitting Civil Rights Implementation Plans, and other plans and reports, to the Department of Justice. Depending on how the agencies' civil rights offices organize outreach and education, technical assistance, and staff training programs, the planning unit also should serve as the liaison for coordinating interagency workshops, seminars, or conferences on compliance and enforcement training and general outreach and education efforts.

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[63] *See* chap. 5, pp. 186–88.

[64] *See* HHS, chap. 6, p. 219 (HHS has a Policy and Special Projects Staff within its primary civil rights office) to provide policy guidance to its regional offices.); USDA, chap. 7, p. 254; HUD, chap. 8, pp. 326–27 (HUD has an Office of Program Standards and Evaluation within its primary civil rights office structure that serves as its primary policy development office.);

[65] *See* chap. 5, p. 187.

### Budget, Staffing, and Workload

**Finding:** None of the Federal agencies[66] provided evidence to indicate that it maintains a separate Title VI appropriation or record of Title VI expenditures. Similarly, most of the subagencies[67] do not track separately expenditures for Title VI enforcement from expenditures for other external civil rights enforcement activities. Only two subagencies, the Farmers Home Administration[68] and the Federal Highway Administration,[69] maintain a separate record of Title VI expenditures. Consequently, most agencies and subagencies do not have the ability to monitor Title VI resources and distinguish the resources necessary for existing Title VI responsibilities, Title VI goals and objectives, and other civil rights obligations. They cannot study and document the trend of Title VI resource needs that enable their civil rights offices to present objective, factual, and logical justifications for appropriate resources. The lack of such a monitoring system hinders the ability to place priorities on civil rights activities and ensure that Title VI enforcement efforts receive proper focus.

The Federal Highway Administration has a particularly useful method of maintaining Title VI expenditures. It was able to report to the Commission not only the total Title VI expenditures for fiscal years 1992 and 1993, but also the individual expenditures in fiscal year 1993 for Title VI technical assistance, training, onsite compliance reviews, and complaint processing, as well as the spending trends since 1976.[70] Monitoring expenses for these individual activities enables the Federal Highway Administration to identify and substantiate resource needs and to allocate staff resources efficiently.

**Recommendation:** All Federal agencies should maintain database systems on their own civil rights enforcement program operations. The systems will ensure that resource allocations and increases are based on serious planning efforts and self-monitoring. The data should include budget information to assess how funds are distributed among headquarters, regional, field, and, in some cases, program offices and State and local agencies to support enforcement activities. The data should reveal the number of personnel performing civil rights enforcement functions, the number assigned specifically to Title VI enforcement, the duties performed, and the assignments of civil rights staff to headquarters, regional, field, and program offices. The agencies also should track the numbers and kinds of enforcement activities performed, distinguishing among Title VI and other statutes. In addition to enforcement activities, agencies should track their Title VI implementation efforts. They should record activity in issuing new or revised regulations, guidelines, procedures, and policies relating to Title VI. Recording these efforts will keep agencies mindful of the need to update documents. Federal agencies similarly should require State and local agencies that perform Title VI enforcement activities to provide them with analogous data to facilitate oversight and monitoring of State and local activities. The collection of these data will assist agencies' planning efforts and support their efforts to increase budget and staffing resources where necessary.

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[66] For discussion of budget in other agency chapters, see DOEd, chap. 5, pp. 188–90; HHS, chap. 6, p. 222; USDA, chap. 7, p. 257; HUD, chap. 8, p. 331; DOL, chap. 9, p. 335; DOI, chap. 10, p. 391; EPA, chap. 11, p. 424; SBA, chap. 12, p. 455; OJP, chap. 13, pp. 479–80 (no indication); DOT, chap. 14, p. 509.

[67] Within the Department of Agriculture, see FNS, chap. 7, p. 275; SCS, chap. 7, p. 312. Within the Department of Transportation, see FAA, chap. 14, pp. 523–26; FRA, chap. 14, pp. 556–57; FTA, chap. 14, pp. 567–70; NHTSA, chap. 14, pp. 582–83; RSPA, chap. 14, pp. 592–93; USCG, chap. 14, p. 600 (no information).

[68] *See* FmHA, chap. 7, p. 297.

[69] *See* FHWA, chap. 14, pp. 542–44.

[70] *See* chap. 14, pp. 542–43. DOL did provide the Commission with a record of separate expenditures for each civil rights compliance or enforcement activity, but not for each Title VI activity specifically.

**Finding:** Virtually every agency reviewed in this report suffered substantial budget cuts in their civil rights offices[71] or, more specifically, in their external civil rights budget since 1975.[72] Some agencies have begun to see budget increases during the past 2 years,[73] but most have not reached budget levels that match previous years.[74] Similarly, since 1975, most of the agencies reviewed faced decreases in their civil rights staff generally[75] or, more particularly, in their external civil rights staff.[76] A few increased their external civil rights staff during the 1990s, but as with budget resources, the levels did not exceed those in previous years.[77]

In addition, with the enactment of the Americans with Disabilities Act of 1990 and other new laws, as well as increases in the size of agencies' federally assisted programs, the workload of the agencies has generally increased.[78] Many agencies indicated that the overall decline in civil rights budget and staffing resources and the increased workload have hindered their abilities to meet Title VI responsibilities.[79] As a result, few agencies have the necessary resources to mount a fully effective civil rights enforcement program. The number of civil rights staff necessary for an agency or subagency depends on the number of programs and type of enforcement activities on which the agency or subagency relies. Based on the Commission's review of Federal agencies and subagencies in light of their programs and enforcement activities, many agencies and subagencies are extremely understaffed.[80]

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[71] *See* SBA, chap. 12, p. 466.

[72] DOEd, chap. 5, p. 189; DOL, chap. 9, p. 356; DOI, chap. 10, p. 391; FHWA, chap. 14, p. 542 (The FHWA showed declines in its Title VI budget since 1976.); NHTSA, chap. 14, pp. 582–83.

[73] *See* DOEd, chap. 5, p. 189; HUD chap. 8, p. 330; DOL, chap. 9, p. 356; SBA, chap. 12, p. 455.

[74] *See* DOEd, chap. 5, p. 189; DOL, chap. 9, p. 356; SBA, chap. 12, p. 455.

[75] *See* SBA, chap. 12, p. 456; FAA, chap. 14, p. 525; FHWA, chap. 14, p. 543; FRA, chap. 14, p. 556; FTA, chap. 14, pp. 569–60.

[76] *See* DOEd, chap. 5, p. 190; HHS, chap. 6, p. 222; USDA, chap. 7, p. 257; DOL, chap. 9, p. 356; DOI, chap. 10, p. 391; EPA, chap. 11, p. 424; FHWA, chap. 14, p. 543 (The FHWA indicated that its staff devoted to Title VI decreased by one-half since 1976.)

[77] DOEd, chap. 5, p. 189; USDA, chap. 7, p. 257 (Although the number of staff devoted to external civil rights staff declined in the 1980s, the current reorganization should increase this staff.) HUD, chap. 8, p. 330 (Because HUD did not provide information on the years prior to 1992, there is no indication is staff levels exceed those of previous years.); EPA, chap. 11, p. 424 (However, most of the additional staff members were assigned to the environmental justice program, rather than Title VI.); OJP, chap. 13, p. 480; FTA, chap. 14, pp. 569–70.

[78] DOEd attributed an increased workload, in part, to an increase in complaints, chap. 5, p. 189; HHS, chap. 6, p. 223; USDA's civil rights office reported that its workload increased due to an increase in the number of section 504 complaints, chap. 7, p. 258; DOL, chap. 9, p. 356; DOI, chap. 10, p. 392; EPA, chap. 11, p. 425; SBA, chap. 12, p. 456; OJP, chap. 13, p. 481 (OJP attributes the increased workload to the police hiring supplement program.); of the subagencies, within the USDA, see FNS, chap. 7, p. 278; FmHA, chap. 7, p. 297 (FmHA attributed it to downsizing in FmHA county and district offices and new civil rights regulations.); SCS, chap. 7, p. 312. Within DOT, see FAA, chap. 14, p. 525; FHWA, chap. 14, p. 543; FRA, chap. 14, pp. 556–57; FTA, chap. 14, p. 540; NHTSA, chap. 14, p. 583; RSPA, chap. 14, p. 593.

[79] *See* DOEd, chap. 5, pp. 189–90; DOL, chap. 9, p. 359; DOI, chap. 10, p. 391; EPA, chap. 11, p. 633; of the subagencies, see FNS, chap. 7, p. 278; SCS, chap. 7, p. 312; FHWA, chap. 14, p. 543; FRA, chap. 14, p. 557; NHTSA, chap. 14, p. 583; RSPA, chap. 14, p. 593.

The statistics and other information available to the Commission on agencies' budget, staffing, and workload indicate that agencies are falling short of the requirement in DOJ's coordination regulations that they maintain "sufficient personnel."[81] Federal agencies are not fulfilling their legal obligation to enforce Title VI due, in part, to insufficient personnel, as well as inadequate management and planning and poor leadership by the Department of Justice and the agencies' top officials. Consequently, the decreases in budget and staff devoted to Title VI enforcement are of serious concern to the Commission. As the Federal agencies undergo downsizing under the National Performance Review, Title VI efforts may continue to suffer, further jeopardizing the mission of ensuring that all federally funded programs operate in a nondiscriminatory manner.

**Recommendation:** The Commission acknowledges that not all civil rights enforcement problems can be resolved by increases in staff or funding alone. However, efforts to reduce the national deficit and to downsize the Federal Government should not compromise the Federal Government's statutory obligations to enforce civil rights in federally assisted and conducted programs. In particular, these goals should not prevent the addition of staff or funding for civil rights functions when they are imperative.

To ensure that agencies distribute new staff and greater funding in a cost-effective method, agencies, first, should engage in a thoughtful self-assessment and planning effort and, then, allocate existing and new resources based on that effort. The agencies should perform both short-term and longitudinal studies of their civil rights enforcement programs, assessing how resources currently are used and how they will be used over the next several years in terms of the overall effectiveness of the enforcement programs. The short-term study would reveal crucial areas of need that justify reassignment of existing staff or immediate budget or staff increases. The longitudinal study should track resource needs and allocations for the various civil rights implementation and enforcement activities, and it should analyze how the actual resource allocations affect the programs' effectiveness. Both studies will reveal areas in which agencies should streamline procedures, increase or modify staff responsibilities, or reorganize to increase the overall effectiveness of the enforcement programs.

The agencies should consider less apparent cost-efficient strategies for improving their Title VI enforcement programs, such as development of comprehensive data collection and analysis systems that facilitate the greater use of meaningful desk-audit reviews and establishment of extensive training programs. The use of self-assessment efforts and the imposition of enhanced staff training programs will enable agencies to establish well-defined and stricter staff performance standards. This, in turn, can increase staff efficiency and effectiveness.

However, even the most efficient assessment and planning efforts cannot ensure an effective Title VI enforcement program by themselves. Agencies' civil rights enforcement efforts require strong, sustained leadership and support. The agency Secretaries, the President, and Congress should support self-assessment and planning activities, and they should recognize fully and respond to the resource needs that the assessments and planning efforts reveal.

## Regulations, Guidelines, Policies, and Procedures

### Title VI Regulations—Generally

**Finding:** All of the Federal agencies discussed in chapters 5 through 14 have issued Title VI

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[80] *See* table 15.2.

[81] 28 C.F.R. § 42.414 (1994). *See also* table 15.2.

## TABLE 15.2
## Federal Agencies' Federally Assisted Programs and Civil Rights Budget and Staffing[1]

| | Federal financial assistance | No. of federally assisted programs | No. of recipients | Civil rights budget | Civil rights staff |
|---|---|---|---|---|---|
| DOE | $30 billion | 230 | 25,000 | $58.4 million | 868 |
| HHS | $225 billion | 210 | 700,000 | $22.2 million | 309 |
| HUD | $16.7 billion[5] | 58 | 28,358 | $83.5 million[3] | 726 (315)[4] |
| DOL | $30.4 billion[5] | 14 | 742 | $2.5 million | 31 |
| DOI | $800 million[5] | 53[6] | 12,414 | $5.2 million | 58[7] |
| EPA | $1.3 billion | 33 | 1,500 | $1.8 million | 4 |
| SBA | $7 billion | 16 | 80,000 | $2.4 million[8] | 19.5 |
| DOJ | $780 million | [illegible] | 601 | $97,358 | 3 |
| USDA: | | | | | |
| FNS | $105 million | 15 | | $900,000 | 10[9] |
| FmHA | $6.8 billion | 23 | 81,000 | $7.3 million | 12[10] |
| SCS | $800 million | 2 | 8,000 | $377,000[8] | 5 |
| DOT: | | | | | |
| OS | — | — | — | $1.78 million | 1.5 |
| FAA | $1.8 billion | 3 | 1,834 | $1.5 million | 51[11] |
| FHWA | — | 6 | — | $473,393[12] | 18[13] |
| FRA | $125 million | 2 | 46 | — | 5 |
| FTA | $3.8 billion | 10 | 643 | — | 15[14] |
| NHTSA | $150 million | 2 | 57 | $35,000 | 1 |
| RSPA | — | 4 | — | $4,000[15] | 1 |
| USCG | $25 million | 1 | 71 | | 4[16] |

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[1] Refers to budget and staff for civil rights enforcement pertaining to federally assisted/conducted programs.

[2] OCR Budget, [illegible]

[3] Includes fair housing budget as well as civil rights budget for federally assisted programs.

[4] Includes fair housing staff as well as civil rights staff in federally assisted programs.

[5] Based on estimated FY 1994 obligations as published in Catalog of Federal Domestic Assistance.

[6] The Catalog of Federal Domestic Assistance lists [illegible] of the [illegible] financial assistance programs.

[7] In addition, DOI has 15 staff who have civil rights responsibilities as a collateral duty.

[8] Includes budget for internal civil rights enforcement.

[9] Includes staff assigned to internal civil rights enforcement.

[10] [illegible]

[11] FAA also has 86.1 regional staff members who divide their time between internal and external civil rights enforcement.

[12] Does not include civil rights expenditures of FHWA's field offices.

[13] Includes staff assigned to internal civil rights enforcement. Does not include regional staff assigned to civil rights.

[14] Includes full-time permanent staff members only. All staff are assigned to both internal and external civil rights enforcement.

[15] Does not include staff salaries.

[16] Two employees are assigned to Title VI enforcement.

Source: Agency Responses to U.S. Commission on Civil Rights Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964 and agencies' Civil Rights Implementation Plans.

regulations as required by the Department of Justice's (DOJ's) coordination regulations.[82] Most agencies' regulations meet the basic requirements of the coordination regulations and the Commission's 1966 *Compliance Officer's Manual*,[83] which the Department of Justice applies as a standard. Most follow the general format of the Department of Education's Title VI regulations, which the Department of Justice designated as a model.[84] Some agencies' regulations have provisions that excel those of the Department of Education, while others omit provisions or have sections falling short of the model. All agencies' Title VI regulations are deficient in some general respects. Most Federal agencies have not updated their Title VI regulations to reflect new developments in the law, such as the passage of the Civil Rights Restoration Act of 1987,[85] or changes in program operations and funding mechanisms, such as the greater reliance on block grant funding and State-performed civil rights enforcement activities. In the midst of these developments and changes, status quo in agencies' Title VI regulations will allow discrimination to arise unchecked or to continue. Therefore, revisions to existing Title VI regulations are necessary.

**Recommendation:** To update and improve all Federal agencies' Title VI regulations, the Department of Justice must assume leadership and provide the Federal agencies with updated model Title VI regulations. In addition, all Federal agencies should review their existing Title VI regulations in light of the findings identified in this chapter and the chapters specific to the agencies. With consideration of the Commission's recommendations and the updated model regulations, they should adopt provisions or modifications appropriate to the needs of their Title VI enforcement programs and the Federal programs they fund.

The Department of Justice and the Federal agencies should establish a system of communicating and discussing future developments in Title VI case law that affect Title VI enforcement programs. The Department of Justice must bear the responsibility for tracking developments systematically. It should encourage forum meetings among all Federal agencies' civil rights enforcement offices with Title VI responsibility to discuss governmentwide implications of new developments. Based on those discussions, it should promulgate new model regulations and provide all Federal agencies with the updated version. Federal agencies must respond by revising their regulations promptly. By implementing this tracking and response process, the Department of Justice and Federal agencies will have an effective means of ensuring that all Title VI regulations reflect current law and new trends with respect to the operation and funding of Federal programs.

### Title VI Regulations—Updating

**Finding:** None of the Federal agencies reviewed has made significant modifications to its regulations since the mid-1980s, and several[86] have not altered their regulations in any way since 1973.[87] As a result, none of the regulations reflects recent Title VI developments, such as the implications of the Civil Rights Restoration Act of 1987 in two areas, coverage of Title VI and fund termination authority.[88] With regard to the first area, none of

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[82] 28 C.F.R. section 42.403 (1994).

[83] U.S. Commission on Civil Rights, *Compliance Officer's Manual: A Handbook of Compliance Procedures under Title VI of the Civil Rights Act of 1964* (1966) (hereafter cited as *Compliance Officer's Manual*).

[84] *See* HHS, chap. 6, p. 223; HUD, chap. 8, p. 331; DOL, chap. 9, pp. 356–61; DOI, chap. 10, p. 392; SBA, chap. 12, pp. 457–59; OJP, chap. 13, p. 482.

[85] Pub. L. No. 100–259, 102 Stat. 28 (codified as amended in scattered sections of U.S.C.).

[86] USDA, chap. 7, pp. 251–53; HUD, chap. 8, p. 331; DOL, chap. 9, pp. 359–60.

[87] *See* table 15.3.

[88] Pub. L. No. 100–259, 102 Stat. 28 (codified as amended at 20 U.S.C. §§ 1681note, 1687, 1687note, 1688, 1688note (1988); 29 U.S.C. §§ 706, 794 (1988 & Supp. V 1993), 42 U.S.C. §§ 2000d-4a, 6107 (1988)).

**TABLE 15.3**
**Federal Agencies' Title VI Regulations**

| | Specific Title VI regulations | Year last updated | Appendix A | Employment discrimination | Examples relating to agency's programs | Comments |
|---|---|---|---|---|---|---|
| DOE | Yes | 1980 | Continuing State programs listed separately | Yes | Good | |
| HHS | Yes | 1973 | Continuing State programs listed separately | Yes | Same examples as DOE; some HHS examples | Has proposed block grant regulations |
| USDA | Yes | 1985 | Programs listed separately by agency | Yes | Good | |
| HUD | Yes | 1973 | All programs listed together | Yes | Same examples as DOE; no HUD examples | No assurances/methods of administration required of States operating continuing State programs |
| DOL | Yes | 1973 | No Appendix A | Yes | Good | Strong JTPA regulations recently published |
| DOI | Yes | 1979 | All programs listed together | Yes | Same examples as DOE; no DOI examples | |
| EPA | No | 1984 | All programs listed together | Yes | Few examples | Does not explicitly prohibit discrimination in a facility built with Federal funds. No regulations for continuing State programs. |
| SBA | Yes | 1985 | No continuing State | Stronger | Some SBA examples | Does not prohibit denying an individual the opportunity to participate; no language about planning/advisory boards |
| OJP | Yes | 1981 | All programs listed together | Yes | Same examples as DOE; no DOJ examples | Special assurance language |
| DOT | Yes | 1973 | All programs listed together | Yes | Good; Appendix B with DOT examples | |

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[1] DOL has separate Title VI regulations, but its JTPA regulations apply to Title VI and other civil rights statutes.

[2] The Department of Labor has recently issued Title VI regulations for the Job Training Partnership Act, but not for its other federally assisted/conducted programs.

[3] EPA updated the portion of its regulations pertaining to discrimination on the basis of disability in 1990, but has not updated the portion pertaining to Title VI since 1984.

the agencies' regulations contains the act's precise definition of "programs and activities," which extends Title VI coverage to prohibit discrimination in an entire institution even if only part of that institution receives funds. Although the act simply restored Title VI coverage to its scope before the decision in *Grove City College v. Bell*,[89] no agency's Title VI regulations clarify and codify the act's important language. Similarly, no agency's regulations reflect the discussion in the legislative history of the Civil Rights Restoration Act on fund termination. That discussion describes an intent to restore agencies' authority to terminate or suspend funds both if the discrimination is "pinpointed" to the use of the funds and if the use is "infected" by discrimination elsewhere in the operations of the institution.[90] Neither Title VI nor the Civil Rights Restoration Act expressly allow or recognize the "pinpointing" and "infection" theories, leaving the issue to debate and uncertainty. Most agencies[91] have not updated their regulations since the 1984 decision in *Grove City v. Bell*, which cast doubt on authority to use the infection theory, or since the passage of the Civil Rights Restoration Act in 1987. Given the uncertainty on the issue, policy guidance is necessary to assist recipients, beneficiaries, and civil rights staffs in understanding the extent of the fund termination remedy under Title VI.

**Recommendation:** The Department of Justice should draft updated model regulations that address developments in Title VI law, such as the implications of the Civil Rights Restoration Act of 1987. These regulations should include the broadened definition of "programs and activities," so that the nondiscrimination prohibition applies to an entire institution rather than the specific part that receives Federal funds. They also should reflect the current state of the law on termination of funding under Title VI. All Federal agencies should revise their Title VI regulations or provisions to reflect the clarifications made by the Civil Rights Restoration Act of 1987 and to provide guidance on the fund termination remedy. In the alternative, agencies must issue policies and guidelines to reflect the act's implications for Title VI coverage and fund termination authority. Agencies also should disseminate this information to recipients, subrecipients, and community advocacy organizations to ensure that they are knowledgeable on these issues. Through outreach and education efforts, Federal agencies should inform potential and actual beneficiaries and program participants of the practical meanings of these implications.

### Title VI Regulations—Revisions

**Finding:** Many agencies have not revised their regulations to accommodate changes in the way Federal programs operate. Some agencies[92] simply adopted the Department of Education's Title VI regulations without changes. Consequently, those agencies retained in their regulations education-related examples unrelated to their programs.[93] With the exception of the Department of Labor, which issued new nondiscrimination regulations for its Job Training Partnership Act program in 1993,[94] most agencies have not tailored their Title VI regulations to specific programs. For instance, none of the agencies that administers block grant programs has regulations addressing block grants specifically.[95] Block grant programs provide Federal money to States automatically based on a statutory formula, and they give States broad discretion in spending the money. As a result, it is more difficult for Federal agencies to conduct preaward compliance reviews before States receive Federal funding. Furthermore, in the absence of regulations specifying procedures for withholding or terminating funds when block grant programs are found in noncompliance, the authority of Federal agencies to do so is unclear. The failure to address block grant funding in agencies' Title VI regulations will become a greater problem for Title VI enforcement in the near future as Congress considers the enactment of new block grant programs.

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[89] 465 U.S. 555 (1984). For a further discussion, *see* chap. 2, pp. 36–40.

[90] *See* discussion in chap. 2, pp. 36–40.

[91] *See* table 15.3.

[92] HHS, chap. 6, p. 223; USDA, chap. 7, pp. 258–59; HUD, chap. 8, pp. 331–32; DOI, chap. 10, pp. 392–93.

[93] *See* table 15.3.

[94] *See* DOL, chap. 9, pp. 359–61, and *see* discussion below.

[95] The Department of Health and Human Services has a proposed rule on nondiscrimination requirements applicable to block grants. The rule was first proposed in 1986, but has never been issued. *See* chap. 6, p. 224.

**Recommendation:** The model regulations and all agencies' Title VI regulations should have specific provisions on block grant programs and continuing State programs, especially with respect to requiring basic enforcement and compliance procedures. Agencies should specify and distinguish the obligations of the Federal agency and the State agency for civil rights enforcement of those programs. The clarification will more effectively inform recipients, subrecipients, beneficiaries, program participants, and others of whether Title VI enforcement activities will be conducted at the Federal or State level. In addition, the provisions in the regulations will allow civil rights enforcement programs within the Federal and State agencies to conform to changes in Federal program operations and funding mechanisms.

### Appendix of Federally Assisted Programs

**Finding:** None of the Federal agencies regularly updates its regulations' appendix that lists the agency's federally assisted programs. Many agencies' appendices have not been updated for more than a decade;[96] thus, some do not list many newly enacted programs.[97] At least one agency[98] does not have such an appendix in its current regulations. As an alternative to updating the appendix, one Federal agency[99] has considered revising its appendix to reference an annual departmental publication that lists its federally funded programs. At least two agencies[100] list continuing State programs in a separate appendix. By listing these programs separately, agencies can distinguish between the programs in which the Federal agencies perform the Title VI compliance and enforcement activities and the programs in which State agencies conduct the Title VI compliance and enforcement activities and the Federal agencies evaluate States' performance and compliance with Title VI.

**Recommendation:** Agencies must ensure that their Title VI regulations' appendices include all federally assisted programs administered by that agency. The agencies should arrange annual reviews and revisions to the appendices so that the listings remain current. Otherwise, the agencies should include references in their Title VI regulations to agency-specific publications of federally assisted programs. Agencies should update the publications when new programs are created and should make the publications available to recipients, actual and potential beneficiaries, program participants, and the public generally. In addition, the agencies' regulations should include appendices listing their State continuing programs, as well as their block grant programs.

### Title VI Regulations—Content

#### *Specific Discriminatory Practices*

**Finding:** The Commission's *Compliance Officer's Manual* lays out certain forms of discrimination that must be prohibited in agencies' regulations.[101] Most of the agencies reviewed in chapters 5 through 14 prohibit all of these forms of discrimination and other discriminatory practices.[102] However, the regulations of two agencies do not prohibit all of these forms of discrimination.[103]

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[96] *See* DOEd, chap. 5, p. 193; DOI, chap. 10, p. 393; EPA, chap. 11, pp. 426–28; SBA, chap. 12, pp. 457–59.

[97] For example, HUD's Title VI regulations' appendix does not include the home investment in affordable housing program. *See* chap. 8, pp. 331–32. The Federal Aviation Administration within the Department of Transportation noted that the Department's Title VI regulations' appendix was missing two FAA programs. *See* chap. 14, pp. 526–28.

[98] DOL, chap. 9, pp. 359–60.

[99] DOEd, chap. 5, p. 193.

[100] DOEd and HHS. *See* table 15.3.

Program-specific examples of specific discriminatory practices clarify an agency's prohibited activities for civil rights enforcement staff, applicants, recipients, and potential and actual beneficiaries. However, three agencies[104] have not attempted to create examples reflecting their programs. Of the agencies that have included program-specific examples in their regulations, some of the examples were exemplary. For example, the U.S. Department of Agriculture's regulations offer as an example of prohibited discrimination any practice that would exclude a member or stockholder of a cooperative or corporation from participating in any meeting or that would be discriminatory with respect to the exercise of their rights.[105] The Department of Transportation's Title VI regulations have an appendix devoted specifically to providing examples related to federally funded transportation programs.[106]

**Recommendation:** The updated model regulations must contain a comprehensive list of specific discriminatory practices prohibited, including those practices listed in the Commission's *Compliance Officer's Manual*. All Federal agencies' Title VI regulations should reflect this listing. In addition, all agencies must provide program-specific examples of the prohibited discriminatory practices, especially relating to the types of services that the programs offer. Agencies should include these examples in literature disseminated to applicants, recipients, potential and actual program beneficiaries, community organizations, and the public generally. These examples will provide individuals and entities with a clear understanding of their rights and responsibilities under Title VI.

### *Employment Discrimination*

**Finding:** Both Title VI and DOJ's coordination regulations proscribe employment discrimination.[107] Therefore, it is important for Federal agencies to include language on employment discrimination in their regulations. With respect to employment discrimination, all Federal agencies prohibit employment discrimination both:

1) where a primary objective of the Federal financial assistance to a program is to provide employment; and

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[101] *See* chap. 4, p. 162.

[102] DOEd, chap. 5, p. 191; HHS, chap. 6, pp. 223–24; USDA, chap. 7, p. 259; HUD, chap. 8, p. 331; DOL, chap. 9, p. 359; DOI, chap. 10, pp. 392–94; DOT, chap. 14, pp. 510–11. They also prohibit denying a person the opportunity to participate on a planning or advisory board that is an integral part of the program, an important addition not listed in the *Compliance Officer's Manual*.

[103] EPA does not prohibit explicitly discrimination in activities conducted in a facility built with Federal funds. *See* chap. 11, p. 427. The SBA does not prohibit denying an individual an opportunity to participate in the program through the provision of services or otherwise affording that person an opportunity which is different from that afforded to others under the program. It also does not proscribe denying a person the opportunity to participate as a member of a planning or advisory board which is an integral part of the program. *See* chap. 12, p. 459.

[104] HUD, chap. 8, p. 331; DOI, chap. 10, p. 392; OJP, chap. 13, p. 482. *See* table 15.3.

[105] *See* chap. 7, p. 267.

[106] *See* chap. 14, p. 506.

[107] *See* chap. 4, pp. 163–64.

> 2) where an employment practice by a recipient tends to result in discrimination against beneficiaries or potential beneficiaries of the recipient's program.[108]

Three agencies' regulations name specific programs in which employment discrimination is prohibited unconditionally. The Small Business Administration's regulations contain a blanket prohibition of employment discrimination by recipients that are small business concerns and development companies because the agency deems that the purpose of assistance to these recipients necessarily is the provision of employment.[109] The Department of Labor's Job Training Partnership Act (JTPA) regulations specify that employment discrimination is prohibited in connection with any JTPA-funded program or activity.[110] Similarly, the nondiscrimination regulations for the Office of Justice Programs in the Department of Justice broadly prohibit employment discrimination regardless of the purpose of the program or Federal financial assistance.[111]

None of the agencies' regulations provides adequate examples or illustrations of what is meant by employment discrimination. None clarifies sufficiently the distinction between the types of employment-related discrimination. For instance, employment discrimination occurs when a recipient, subrecipient, or beneficiary of Federal funds or assistance discriminates in its hiring, firing, promotions, or transfers of the individuals it employs. Employment-related discrimination under Title VI also can involve a recipient, subrecipient, or beneficiary that has a work force predominantly composed of one race, ethnicity, or national origin. Even if the underrepresentation of minorities does not result from a discriminatory employment practice, a violation of Title VI would exist if the decisions or conduct of those employees discriminate against actual or potential beneficiaries, program participants, or others affected by the program. Because Federal agencies' regulations lack this clarification, individuals may not be adequately informed of discriminatory employment-related practices.

**Recommendation:** The model regulations must maintain the prohibition of employment discrimination both when the primary objective of the federally funded or conducted program is to provide employment and when an employment practice results in discrimination against actual or potential beneficiaries or others. Federal agencies should include in their Title VI regulations specific examples of the different types of employment-related discrimination, including examples related to the Federal programs they administer or fund.

### *Other Nondiscrimination Regulations*

**Finding:** Some of the agencies reviewed in chapters 5 through 14 have regulations in addition to their Title VI regulations that supplement their Title VI programs and serve as commendable examples for other Federal agencies. The Department of Labor's nondiscrimination regulations for its JTPA program are much more specific than the Title VI regulations of all Federal agencies in the area of dissemination of recipients' nondiscrimination policies.[112] The JTPA regulations give direct recipients responsibility for disseminating JTPA's nondiscrimination policy to actual and potential participants/beneficiaries. Unlike most agencies' Title VI regulations, which require recipients merely to make information available, the JTPA regulations are very detailed as to how such dissemination should occur, including requirements for dissemination to persons with limited English proficiency.[113] The language of the JTPA regulations with respect to data collection requirements[114] and the obligations of Governors for JTPA State-funded programs[115] is stronger than the standard requirements of the Title VI regulations.[116]

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[108] DOEd, chap. 5, p. 191; HHS, chap. 6, pp. 223–24; USDA, chap. 7, pp. 258–59; HUD, chap. 8, p. 331; DOL, chap. 9, pp. 359–60; DOI, chap. 10, pp. 392–93; EPA, chap. 11, pp. 426–27; SBA, chap. 12, pp. 457–58; OJP, chap. 13, p. 482; DOT, chap. 14, p. 510. *See* table 15.3.

[109] *See* chap. 12, p. 458.

[110] 29 C.F.R. §34.3. *See* chap. 9, p. 359.

[111] *See* chap. 13, p. 483.

[112] 29 C.F.R. § 34.23 (1994). *See* chap. 9, pp. 359–60.

The Department of Agriculture has issued an order among its agency heads requiring an assessment of proposed Federal programs before the agency heads implement them.[117] The agency heads must identify and address the civil rights implications of a proposed agency action, such as the granting of Federal funds for a particular project, before they carry out that action. The Department of Education requires each applicant for financial assistance to provide a description of the measures it will take to ensure equal access to or participation in the federally assisted project or activity.[118] Both of these requirements are useful in identifying programs or projects that will have disparate effects on potential beneficiaries, participants, or affected communities. They serve as preventive tools in ensuring compliance with Title VI.

**Recommendation:** The Federal agencies should consider adapting the provisions in the Department of Labor's JTPA nondiscrimination regulations as a means of ensuring that States fulfill their responsibilities to enforce Title VI in State- and local-administered programs. The agencies also should examine the Department of Agriculture's internal order and the Department of Education's preaward requirement and adopt similar provisions to strengthen their Title VI implementation and enforcement programs at the preaward stage.

### Internal Regulations for Decentralized Title VI Enforcement Programs

**Finding:** Three of the Federal agencies[119] reviewed in this report have decentralized Title VI enforcement programs. These agencies have a primary civil rights office that serves as an "umbrella" office that coordinates, monitors, and evaluates the civil rights enforcement efforts of the subagencies, specifically the agency heads within the Department of Agriculture,[120] the bureaus within the Department of Interior,[121] and the modal administrations within the Department of Transportation.[122] The agencies have Title VI regulations issued by the primary civil rights offices within the agencies. However, only two[123] of the three agencies have internal orders specifying the roles and responsibilities of their respective subagencies. Both the Department of Agriculture's

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[113] 29 C.F.R. § 34.23 (1994). *See* chap. 9, p. 383.

[114] 29 C.F.R. § 34.24 (1994). *See* chap. 9, p. 383.

[115] 29 C.F.R. §§ 34.30–34.34 (1994). *See* chap. 9, p. 383.

[116] These provisions are discussed in more detail under "Oversight of Continuing State Programs." *See* pp. 665–67 of this chapter.

[117] *See* chap. 7, pp. 258–59.

[118] *See* chap. 5, p. 198.

[119] USDA; DOI; and DOT. *See* table 15.1. HHS' Title VI program is at least partially decentralized. HHS indicated that its Operating Divisions has some Title VI responsibilities, although the Commission found no evidence that the Operating Divisions maintained independent civil rights enforcement offices. *See* chap. 6, p. 220.

[120] These include the Food and Nutrition Service, the Farmers Home Administration, and the Soil Conservation Service.

[121] The bureaus with delegated Title VI enforcement responsibilities include the Fish and Wildlife Service (hereafter cited as FWS), the National Park Service (hereafter cited as NPS), and the Bureau of Reclamation (hereafter cited as BR).

[122] These include the Federal Aviation Administration, the Federal Highway Administration, the Federal Railroad Administration, the Federal Transit Administration, the National Highway Traffic Safety Administration, the Research and Special Programs Administration, and the U.S. Coast Guard.

[123] USDA and DOT.

Departmental Regulations[124] and the Department of Transportation's directives[125] serve as models of how an agency can coordinate its decentralized Title VI enforcement program to ensure that all the subagencies within the department enforce Title VI consistently. Both discuss the roles of the primary civil rights offices in overseeing, coordinating, and monitoring the agency heads and modal administrations. Both describe the agency heads and modal administrations' specific responsibilities in conducting enforcement activities. They demonstrate at least the foundation for an adequate decentralized Title VI program.

One of the benefits of a decentralized Title VI enforcement program is that the subagencies' civil rights offices can concentrate on issuing regulatory guidelines tailored to the specific programs. For example, the Food and Nutrition Service in the Department of Agriculture operates under its own instructions. These instructions describe the agency head's civil rights enforcement procedures and responsibilities to enforce civil rights laws. They go beyond the Department of Agriculture's Title VI regulations in that they have specific provisions for each of its major federally assisted programs providing guidance on nondiscrimination in the programs and describing responsibilities and procedures tailored to how the programs operate.[126] Other subagencies[127] have similar regulatory guidelines, although many[128] do not. Of the subagencies that do issue their own instructions describing the nondiscrimination requirements and procedures for enforcing civil rights in their programs, none includes standards for compliance. Consequently, the civil rights and program staffs who perform compliance reviews, as well as the applicants and recipients reviewed, have no guidance on what criteria establish compliance or indicate noncompliance.

**Recommendation:** All agencies with decentralized enforcement programs should ensure that, in addition to having Title VI regulations, they provide regulatory guidance to subagencies, delineating the role of the primary civil rights office in relation to the role of each subagency's civil rights enforcement program. These directives and orders should provide agencies with sufficient oversight, coordinating, and monitoring abilities to ensure that external civil rights laws are enforced agencywide. They also should impose requirements on subagencies to establish outreach and education and staff training programs, develop systems of data collection and analysis, provide technical assistance, and develop compliance review processes. They should provide guidance on handling findings of noncompliance, imposing sanctions, and affording remedies. The agencies' directives and orders also should impose certain reporting requirements on subagencies so that agencies can structure thorough desk-audit review processes. These types of directives and orders will ensure that subagencies have the foundations for strong civil rights enforcement programs. Finally, each subagency should issue its own directives, orders, or instructions that list program-specific requirements for compliance with Title VI.

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[124] The Department of Agriculture's Departmental Regulations supplement the Department's Title VI regulations. For example, Departmental Regulation 4330-1 establishes policy, provides guidance to the agency heads on compliance reviews, requires the agency heads to have a compliance review system, and gives the agency heads responsibility for preparing an annual Civil Rights Implementation Plan. It also contains an appendix which specifies what the agency heads should consider in determining an applicant/recipient's compliance status. The appendix also requires a system of collecting and reporting program participation data. U.S. Department of Agriculture, Office of Advocacy and Enterprise, Departmental Regulation 4330-1, "Departmental Policy for Program Compliance Reviews," June 27, 1986. *See* chap. 7, pp. 258–59.

[125] DOT Order 1000.12 coordinates the modal administration's Title VI enforcement activities. For example, DOT Order 1000.12 details the responsibilities of the Department's Office of Civil Rights which include developing and disseminating policy; preparing uniform regulations, guidelines, and program directives; reviewing and evaluating modal administrations' activities and compliance with DOT orders; providing leadership, guidance and assistance to the modal administrations, and overseeing complaint processing. *See* chap. 14, p. 508.

[126] *See* chap. 7, pp. 278–79.

[127] *See* FmHA, chap. 7, pp. 298–99 (Instruction 1901-E); SCS, chap. 7, pp. 313–18 (General Manual 230, Part 405); FHWA, chap. 14, pp. 544–46; USCG, chap. 14, pp. 600–01.

[128] FAA, chap. 14, pp. 526–28; FRA, chap. 14, pp. 557–58; FTA, chap. 14, p. 571; NHTSA; chap. 14, p. 584; RSPA, chap. 14, p. 593. These modal administrations that do not have their own Title VI-related regulations operate under DOT's general Title VI regulations and DOT Order 1000.12. DOI provided no indication that its three bureaus with civil rights enforcement responsibilities, NPS, FWS, and BR, maintain separate regulatory guidelines. Similarly, HHS did not provide any evidence that its operating divisions issued program-specific guidelines or regulations relating to civil rights enforcement responsibilities.

## Guidelines, Policies, and Procedures

### *Guidelines*

**Finding:** No agency is in compliance with the requirement that agencies publish Title VI guidelines for *each* of their federally assisted programs.[129] Some agencies[130] do not have Title VI guidelines for any of their federally assisted programs. Others have issued guidelines for one or more of their programs, but not for all of them.[131] The failure of Federal agencies to develop Title VI guidelines for all federally assisted programs is problematic, since such guidelines communicate detailed instructions on Title VI enforcement efforts. Without this guidance, Federal agencies have no written direction on tailoring their Title VI enforcement activities to specific programs.

Three agencies have comprehensive guidelines that serve as useful models. The Department of Housing and Urban Development's "Guidance for FHEO Review of HOME Investment Partnerships Program Descriptions" provides civil rights staff with an overview of the HOME program; outlines the responsibilities of civil rights staff in reviewing HOME program descriptions submitted by applicants; lists the civil rights laws and regulations relevant to the HOME program; instructs civil rights staff to provide technical assistance to applicants, including informing them about all relevant civil rights laws and regulations; and provides detailed guidance on what to consider in their civil rights review of applicants' program descriptions.[132] The Department of Labor's "Equal Opportunity Guidebooks" for the JTPA program and for State employment security agencies explain relevant civil rights laws. They also provide indepth explanations of the data collection and analysis process, with specific examples related to the job placement and referral programs and the unemployment insurance program. In their descriptions of compliance review and complaint investigation procedures, they offer program-specific examples of specific instances of discrimination. The "Equal Opportunity Guidebook" for the JTPA has a section discussing and illustrating the implications of the Civil Rights Restoration Act for Title VI coverage.[133] Finally, the Federal Transit Administration's "Title VI Program Guidelines for Urban Mass Transportation Administration Recipients" provides information on covered programs, data collection and reporting requirements, monitoring procedures for transit providers, types of compliance reviews, remedial actions and enforcement procedures, Title VI discrimination complaints, and public information requirements.[134]

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[129] 28 C.F.R. 42.404(a) (1994). *See* chap. 4, pp. 164–65.

[130] Agencies that have not issued Title VI guidelines for any of their programs include: HHS, chap. 6, p. 224; USDA, chap. 7, p. 259; EPA, chap. 11, p. 428; SBA, chap. 12, p. 459; OJP, chap. 13, pp. 483–84.

[131] DOEd has published guidelines for its vocational education assistance programs. *See* chap. 5, p. 193. HUD has distributed numerous procedural and policy guidance related to Title VI generally and to certain HUD-sponsored programs. *See* chap. 8, p. 332. DOL has issued guidelines for its JTPA program and guidebooks for State employment security agencies and Jobs Corp. *See* chap. 9, pp. 359–60. DOI has issued guidelines for its land and water conservation fund program, national register program, and Bureau of Land Management's federally assisted programs. *See* chap. 10, p. 393.

[132] *See* chap. 8, p. 332.

[133] *See* chap. 9, pp. 359–60.

**Recommendation:** To comply with DOJ's coordination regulations, each Federal agency, at a minimum, should publish guidelines for each type of federally funded or federally conducted program under its jurisdiction. The guidelines should describe the nature of Title VI's coverage with respect to the Federal program and discuss the broadened coverage that the Civil Rights Restoration Act of 1987 restored. The guidelines also should define and set minimum standards for methods of enforcement relating to each type of Federal program. They should provide examples of prohibited practices in the context of the particular type of program and specify required or suggested remedial action. The guidelines should provide program-specific explanations of requirements for employment-related practices covered under Title VI. Finally, the guidelines should outline basic formats for conducting thorough self-assessment reviews of agencies' civil rights enforcement programs and for establishing short-term and long-term strategies based on these self-studies.

Each Federal agency should issue guidelines for providing oversight and monitoring of State Title VI compliance and enforcement activities. The guidelines should reflect the existence of a Federal and State partnership in which the Federal agency maintains ultimate responsibility for compliance of primary State recipients and State subrecipients with Title VI. The guidelines must clearly specify the responsibilities of State recipients. The guidelines should include State-specific methods of administration and provide detailed guidance on compliance and enforcement procedures, including investigative methods, remedies and sanctions, and systems of data collection and analysis. They should specify the type of information for each Federal program that the State agencies and recipients must collect for evaluations of compliance with Title VI. The guidelines should offer examples of the kinds of information that signal potential noncompliance with Title VI, and they should provide other instructional assistance on analyzing data so that subtle forms of discrimination can be identified. The guidelines should explain clearly the Federal agencies' role with respect to oversight and monitoring of State activity and the States' obligations to Federal agencies. They should also establish compliance and enforcement standards for both Federal and State agencies' civil rights enforcement efforts with respect to each Federal program. With respect to Federal agencies' civil rights enforcement activities, this type of guidance usually is found in procedural manuals for Federal civil rights staff; however, guidelines also may be used for this purpose. To ensure that both Federal and State agencies understand that these guidelines are minimum standards, rather than unrealistic goals, Federal agencies should make reference to these guidelines in their Title VI regulations.

In addition to offering guidance on the basic structures and operations of Federal and State agencies' Title VI programs, guidelines also should serve as a means by which agencies provide leadership on specific topical issues. All agencies should issue civil rights guidelines on issues such as racial incidents, racial harassment, hostile racial environments, and environmental equity. Such guidelines will assist civil rights enforcement staffs in dealing with complaint investigations on these issues.

### *Policies*

**Finding:** With the exception of the Department of Education, which regularly issues detailed policy statements,[135] none of the Federal agencies reviewed engages actively in development and dissemination of Title VI policy on a regular basis.[136] The failure of those agencies to develop active Title VI policy programs leaves Federal and State agency compliance staffs and federally funded program recipients and participants uncertain of how Title VI applies to each federally assisted program, particularly in emerging policy areas. In addition, in light of Executive Order 12,250's mandate that agencies issue "appropriate implementation directives. . . in the nature of policy guidance," the lack of policymaking efforts by Federal agencies constitutes a significant inadequacy in their Title VI programs.[137]

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[134] *See* chap. 14, p. 571.

[135] *See* chap. 5, pp. 193–96.

The Department of Education's activities in providing policy guidance are exemplary. For example, in 1990 the Department of Education reissued a May 1970 memorandum on the identification of discrimination and denial of services on the basis of national origin and a 1985 policy document outlining the Office for Civil Rights' (OCR) compliance procedures for language minority students.[138] In 1991 the Department issued a policy update on the same topic designed to guide OCR's compliance reviews of federally assisted programs for students with limited English proficiency.[139] In March 1994, OCR issued guidance on procedures and analysis that it would use in investigating issues related to racial harassment of students at educational institutions.[140] These examples are only a few of many demonstrating the Department of Education's active role in developing policy guidance. The volume of the Department of Education's activities in this area is apparent from its use of a computerized "Policy Codification System" to maintain all its letters of findings that constitute new policy.[141]

**Recommendation:** All Federal agencies should institute comprehensive policy development programs similar to that of the Department of Education. The programs will enable agencies to generate policy statements aimed at eliminating all barriers to full participation in or equal access of all individuals to federally assisted programs. These policy statements should react to and consider input from regional offices, State offices, recipients, and potential affected parties. The goal must be to identify issues of concern relating to Title VI that arise from letters of inquiry received by the agencies or surveys, onsite evaluations, or complaint investigations conducted by the agencies. The policy statements should clarify the meaning and intent of Title VI compliance with respect to different types of Federal programs. They also should serve as a means by which the agencies define their positions on complex or controversial issues related to Title VI. They should provide program-specific examples of the types of practices prohibited by Title VI.

The agencies should develop a system for regularly distributing policy statements to Federal and State civil rights enforcement staffs and recipient and subrecipient staffs as soon as the policies are issued. The agencies should compile the policy statements to develop a record over time. Finally, the agencies should publicize their policy statements through workshops, seminars, conferences, community meetings, and appropriate civil rights publications to make beneficiaries, program participants, and the public generally aware of the agencies' policy positions.

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[136] Although no other Federal agencies reviewed have been as active as the Department of Education in issuing Title VI policy, the Department of Housing and Urban Development shows signs of beginning a policy development program. However, it has yet to issue any written policy statements interpreting Title VI or develop a system for disseminating policy statements. *See* chap. 8, p. 334.

[137] Exec. Order No. 12,250, 3 C.F.R 298, § 1-402 (1980), reprinted in 42 U.S.C. § 2000d-1 note (1988). *See* chap. 4, p. 165.

[138] *See* chap. 5, p. 194.

[139] *See* ibid.

[140] *See* ibid., p. 195.

[141] *See* ibid., p. 196.

### Procedures

**Finding:** At least one agency has not issued specific procedures or compliance manuals to aid in the daily operation of Title VI enforcement.[142] Of the agencies that have issued such procedures or compliance manuals, the adequacy of their procedures and/or manuals varies considerably from agency to agency. Some agencies' procedures or procedures manuals have not been updated in more than a decade.[143] Others have updated their procedures manual recently, but the manuals are limited to covering complaint investigations and compliance reviews and do not describe procedures for other Title VI enforcement elements, such as community outreach and education and technical assistance.[144]

The Small Business Administration's Standard Operating Procedures, which currently are under revision, are comprehensive and could serve as a model to other agencies in most respects. They cover almost every aspect of a Title VI enforcement program: compliance procedures, compliance coordination and delegations, outreach and education, data and information collection, compliance reviews, complaints, complaint investigations, procedures for achieving voluntary compliance, technical assistance, and record management.[145] In addition, they have sections tailored to the type and size of businesses and one section devoted to reviews of program offices distinct from reviews of businesses and other recipients.

A few agencies have procedures individually tailored for their different federally assisted programs.[146] The Department of Health and Human Services addresses preaward reviews for medicare providers and procedures for implementing block grant compliance programs.[147] The Department of Agriculture's Departmental Regulation 4330-1 discusses the different types of compliance reviews specific to programs administered by the Department. In addition, the Food and Nutrition Service has specific instructions for each of its major federally assisted programs.[148] The Department of Housing and Urban Development has produced technical guidance memoranda and manuals on conducting compliance reviews of public housing authorities and low-income housing programs. One of its manuals provides detailed instructions on evaluating evidence gathered during onsite investigations, analyzing statistical program data, preparing investigative reports, effecting early compliance resolution, and monitoring recipient performance.[149]

The absence of up-to-date, comprehensive, and specifically tailored procedures or procedures manuals presents problems for Federal agencies' Title VI enforcement programs. Specifically tailored procedures are necessary to accommodate the variety and complexity of the many federally assisted programs. The need for comprehensive procedures that cover all aspects of a Title VI enforcement program is crucial. Without such procedures, agencies' Title VI enforcement may be of poor or uneven quality, and recipients may be unable to obtain necessary information to help them ensure that they are in compliance. The failure by most agencies to draft updated, extensive, and tailored procedures is a deficiency in their Title VI programs.

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[142] OJP within the Department of Justice does not have specific Title VI enforcement procedures or compliance manuals, although its staff has begun research to develop a procedures manual. *See* chap. 13, p. 484.

[143] HUD, chap. 8, p. 332; DOI, chap. 10, p. 394; EPA, chap. 11, p. 428.

[144] DOE, chap. 5, p. 196.

[145] Small Business Administration, Office of Equal Employment Opportunity and Compliance, *Civil Rights Compliance*, Small Business Administration Standard Operating Procedure, section 90, No. 30, Rev. 2, July 20, 1984. *See* chap. 12, pp. 460–61.

[146] DOL's guidelines appear to function as both guidelines and program-specific procedures manuals.

[147] *See* chap. 6, pp. 225–26.

[148] *See* chap. 7, pp. 258–59, 279.

[149] *See* chap. 8, p. 333.

**Recommendation:** All Federal agencies must issue updated procedural manuals tailored to the agencies' programs. The manuals should be comprehensive and detailed, addressing each facet of the Title VI enforcement program. These manuals should make distinctions between federally administered or conducted programs and those managed by State and local recipients. The procedural manuals should address agencies' efforts at performing enforcement efforts, compliance reviews of recipients and other institutions; and activities in oversight, coordination, and monitoring of State-administered programs. For example, the manuals should detail procedures for conducting performance evaluations of State and local agencies that perform the enforcement and compliance activities for recipients and subrecipients.

Specifically, the manuals should serve as step-by-step guides on performing thorough preaward and postaward desk-audit reviews. They should discuss the types of information to consider at both the pre- and postaward stages for each type of federally assisted or conducted program. They should offer guidance on how the information should be analyzed and provide specific examples of information that indicates possible or actual noncompliance with Title VI. Similarly, the section on onsite reviews should specify the types of individuals and entities that must be consulted at the local sites with respect to each type of Federal program. They should offer preparatory steps for interviewing and assessing the recipients, State or local agencies, or other institutions; provide minimum standards on the type of information that should be collected; and give guidance on analyzing the information collected. The sections on complaint investigations, outreach and education efforts, technical assistance, and data collection and analysis should be equally specific so that civil rights staff members will have a full understanding their duties. By providing this type of specific information, these manuals can function as both procedural and training manuals for civil rights staff members. When the manuals are supplemented with extensive training programs and workshops, Federal agencies will ensure that their enforcement and compliance processes identify instances of noncompliance and discriminatory practices to the maximum extent possible. The agencies also should include procedures addressing planning efforts and self-assessment reviews to ensure that these activities are not overlooked.

### *Guidelines, Policies, and Procedures in Decentralized Title VI Enforcement Programs*

**Finding:** The activity of a Federal agency's primary civil rights office in promulgating Title VI guidelines, policies, and procedures is crucial when that agency has a decentralized Title VI enforcement program. Because a department's primary civil rights office generally serves as an "umbrella" office to oversee, coordinate, and monitor the Title VI programs within the subagencies, the development of guidelines, policies, and procedures provides a means of ensuring that the agency heads, bureaus, and modal administrations have foundations for creating effective Title VI programs that are consistently effective throughout the entire agency or department.

Two[150] of the three agencies with decentralized enforcement programs have materials that provide guidance to their respective agency heads and modal administrations. The Department of Transportation's Order 1000.12 describes the core elements that each modal administration's civil rights enforcement program must contain. The order is a comprehensive volume of seven chapters stating the purpose of the modal administrations' Title VI programs, distinguishing the Department and modal administrations' civil rights responsibilities, providing guidance on the different types of employment practices prohibited by Title VI, and specifying procedures and standards for each type of compliance and enforcement activity.[151]

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[150] USDA and DOT.

Similarly, the compliance review manual of the Office of Civil Rights Evaluation (OCRE) at the Department of Agriculture is comprehensive. It offers guidance to OCRE staff on how to conduct compliance reviews and interviews of the agency heads. It also specifies the type of information that OCRE staff should collect and report when evaluating agency heads' performance. One chapter in the compliance review manual defines clearly the responsibilities of the agency heads and describes basic elements that agency heads should include in their civil rights enforcement programs. The guidance that this chapter provides on data collection is exemplary. It states that the agency heads' data collection systems should "identify eligible populations. . . document the quantity and quality of benefits and services delivered to all groups. . .obtain data on all significant aspects of program participation including representation of minorities and women on local committees, boards and councils."[152] It also lists minimum standards for agency heads' data collection and analysis.[153] This type of guidance on data collection serves as a model not only to agencies with decentralized Title VI enforcement programs, but to all Federal agencies enforcing Title VI.

Of the subagencies, only some[154] issue Title VI guidelines, policy, and procedures, and few[155] do so on a continuous and active basis. The lack of activity among the subagencies could be attributed to both the lack of foundation that some agencies have provided for their subagencies and the agencies' failure to supervise the subagencies actively. Although some agencies and subagencies have implemented the underpinnings necessary for sound Title VI enforcement programs, none has a program adequate for the needs of its decentralized structure.

**Recommendation:** All Federal agencies with decentralized enforcement programs should issue detailed procedures manuals. These manuals should distinguish between the functions of the agency's primary civil rights office and the

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[151] U.S. Department of Transportation, Order 1000.12, "Implementation of the Department of Transportation Title VI Program," Jan. 19, 1977, pp. I-3–I-4. *See* chap. 14, pp. 510–11.

[152] U.S. Department of Agriculture, Office of Civil Rights Enforcement (Office of Advocacy and Enterprise), Equal Opportunity Services, Civil Rights Compliance Review Manual, Chapter 4—USDA Programs (no date) (hereafter cited as USDA/OCRE (OAE), *Civil Rights Compliance Review Manual*). *See* chap. 7, pp. 258–59.

[153] According to those standards, the agency heads should: 1) collect participation data by race, sex, national origin, and handicap for all federally assisted and federally conducted programs and activities; 2) evaluate programs to determine the number of beneficiaries by race, sex, national origin, and handicap; 3) identify potential beneficiaries and applicants by race, sex, and national origin; 4) analyze applicable census data; 5) analyze participation data to determine whether minorities, women, and persons with handicaps are being adequately served in proportion to their availability and eligibility; 6) analyze representation on planning and advisory bodies to determine whether minorities, women, and persons with disabilities are adequately represented; 7) assess evaluations to determine whether minorities, women, and persons with disabilities are treated differently in eligibility, membership, enrollment, admission, and other requirements for participation in USDA programs; and 8) implement affirmative steps to correct any deficiency in underrepresentation of programs. USDA/OCRE (OAE), *Civil Rights Compliance Review Manual*, p. 35. *See* chap. 7, pp. 258–59.

[154] FNS, chap. 7, pp. 378–79; FmHA, chap. 7, pp. 298–300; SCS, chap. 7, pp. 313–14; FAA, chap. 14, p. 528; FHWA, chap. 14, pp. 545–46; FTA, chap. 14, p. 511 (The FTA has Title VI guidelines, but provided no policy statements or procedures manuals to the Commission.); USCG, chap. 14, p. 601 (The USCG indicated that it has a Title VI Standard Operating Procedures guide but did not provide a copy to the Commission.).

[155] FNS, chap. 7, pp. 278–79; FHWA, chap. 14, pp. 545–46 (The FHWA issued its own Title VI guidelines, *Title VI Implementation Guide*, which is designed to highlight Title VI issues most likely to arise in federally funded highway programs; define the roles and responsibilities of regional civil rights and program offices and their staffs; outline required elements of State Title VI plans; and provide guidance on the minimum documentation necessary to substantiate Title VI implementation activities. The Federal Highway Administration also is preparing a Title VI handbook and instructional manual and in recent years has issued several policy statements on Title VI. Its efforts are commendable and can serve as a model to other subagencies.).

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subagencies' civil rights obligations. At the agency level, the manuals should discuss procedures for oversight, coordination, and monitoring of subagencies' civil rights enforcement activities. For example, the manuals should describe the steps involved in systematic inspections and evaluations of subagencies' civil rights enforcement programs, and they should list schedules indicating how often these activities should occur. The manuals also should discuss the type of information that the agency's civil rights office should consider in desk-audit evaluations of their subagencies.

Through guidelines, the agencies' civil rights offices should provide definitive guidance on structuring effective civil rights enforcement programs, and they should establish standards with regard to each compliance or enforcement activity for their subagencies' Title VI programs. They also should provide subagencies with assistance and guidance in their planning. For example, they should establish the foundations for an advisory workshop or session in which the agency civil rights office works directly with the subagency civil rights office. Through these workshops or sessions, the agencies can ensure that civil rights enforcement planning is tailored strategically to consider priority issues and efficient allocation of resources. The subagencies' civil rights programs will benefit from the knowledge and experience that the agency civil rights office gains in working with other subagencies' planning strategies. Furthermore, the agency civil rights office will become involved actively in planning the actual Title VI enforcement activities and overseeing civil rights enforcement efforts agencywide.

The agency's civil rights office should have an active and comprehensive policy program that communicates regularly with the subagencies to keep them informed of agencywide developments. The communication also will allow subagencies to provide feedback on how a proposed agencywide policy statement or position will affect the subagencies' federally funded and conducted programs. This process will ensure that the subagencies have a uniform understanding of the agency's policy positions.

At the subagency level, the procedures manuals should have the same specificity as procedures for the agencies that do not have a decentralized Title VI enforcement program. They should provide step-by-step guidance on conducting compliance and enforcement activities; implementing outreach and education, technical assistance, and staff training programs; and developing comprehensive systems of data collection and analysis.

## Process of Title VI Enforcement

An effective Title VI enforcement program requires agencies to pursue actively a number of key enforcement activities. Only one agency, the Department of Education, has demonstrated a strong commitment to Title VI civil rights implementation, compliance, and enforcement. Most of the other Federal agencies reviewed are active in certain activities, such as conducting complaint investigations; however, they lack well-rounded and developed Title VI programs. Federal agencies, however, including the Department of Education, have not used two important enforcement tools, preaward reviews and postaward desk-audit reviews, for all of their federally assisted programs. Furthermore, most agencies do not devote sufficient resources to outreach and education, and they do not have formal staff development and training programs in civil rights laws, theories, and enforcement procedures, and in Title VI in particular. These areas are critical if Title VI programs are to be successful.

### Compliance Reviews

#### *Preaward Reviews*

**Finding:** Preaward reviews serve two useful purposes. First, they allow Federal agencies to ensure, before they disburse funds, that their recipients are in compliance with technical requirements. Second, they can help inform the agency as to whether its programs are reaching all applicants, potential participants, beneficiaries, and the affected communities. Some Federal agencies use preaward reviews, in a limited way, to serve the first purpose. They sometimes, but very rarely, conduct adequate reviews of applicants to determine whether they are in compliance with technical deficiencies. However, agencies never appear to use preaward reviews for the second purpose. They never review recipients to assess their federally assisted programs' impact on minority communities.

Some agencies and subagencies do not conduct any preaward reviews.[156] Of those Federal agencies that conduct preaward reviews, most generally do so for only one of their federally assisted programs[157] or only selected recipients,[158] projects,[159] or facilities.[160] In addition, most agencies that conduct preaward reviews indicated that the number of reviews has declined over time.[161]

Despite the Department of Justice's view that preaward desk-audit reviews do not include routine reviews of assurance forms and other documents to ensure that they have been properly completed,[162] at least one Federal agency[163] and two subagencies[164] have preaward review processes that involve merely confirming that recipients and subrecipients have submitted their assurance forms.

However, some agencies' preaward review processes are more involved.[165] For example, the Department of Education's desk-audit reviews consist of more than just the review of application materials submitted. Staff make telephone calls to the applicants to collect any additional information needed. During these calls, staff also provide technical assistance and occasionally negotiate voluntary compliance.[166] The Federal Transit Administration considers all the information provided by applicants, as well as findings and recommendations from previous reviews, corrective actions taken by applicants, and other information such as applicants' Title VI self-assessments.[167]

Generally, most Federal agencies have not placed adequate emphasis on indepth preaward reviews in their Title VI compliance and enforcement programs. As a result, many Federal agencies are disbursing billions of dollars of Federal financial assistance without an effective system to ensure that all recipients of these funds are in compliance with Title VI and that program funds are being distributed equitably.

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[156] *See* DOL, chap. 9, pp. 362–66; SBA, chap. 12, pp. 461–62; FHWA, chap. 14, pp. 546–47; NHTSA, chap. 14, p. 584. *See* table 15.4.

[157] DOEd, chap. 5, p. 197; HHS, chap. 6, p. 226; EPA, chap. 11, p. 429 (State revolving funds program). *See* table 15.4.

[158] *See* FNS, chap. 7, pp. 280–81 (The FNS generally conducts preaward reviews only for programs in which a high degree of turnover exists.) *See* table 15.4.

[159] The FMHA only performs preaward reviews for water and waste facility loans and other utility-type projects. *See* chap. 7, p. 301. *See* table 15.4.

[160] HHS, chap 6, pp. 226–28. *See* table 15.4.

[161] *See* EPA, chap. 11, pp. 429–30; ; USCG, chap. 14, p. 601. But see FRA, chap. 14, p. 558; FTA, chap. 14, pp. 571–72. *See* table 15.4.

[162] *See, e.g.*, James P. Turner, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, memorandum to Civil Rights Directors, "Guidelines for the development of FY 1994 civil rights implementation plans and supporting workload and performance data," Sept. 7, 1993, p. 18. *See* chap. 4, p. 171.

[163] *See* OJP, chap. 13, pp. 484–85 (for contracts of $500,000 or more).

[164] *See* SCS, chap. 7, pp. 314–15; RSPA, chap. 14, pp. 593–94.

[165] *See* DOEd, chap. 5, p. 197; HUD, chap. 8, pp. 334–35 (HUD issues separate notices specific to certain programs that provide instructions for its civil rights staff on conducting preaward reviews. They provide overviews of the programs, outlines of the staff's responsibilities in conducting desk-audits, lists of the civil rights laws and regulations relevant to the program. They instruct staff to provide technical assistance to applicants.); EPA, chap. 11, pp. 429–30 (The EPA's use of preaward compliance review forms provides more specific information than assurance forms.); FAA, chap. 14, p. 528; FTA, chap. 14, pp. 571–72.

[166] *See* chap. 5, pp. 197–98.

[167] *See* chap. 14, pp. 571–72.

## TABLE 15.4
## Federal Agencies' Title VI Enforcement Activity

| | **Preaward reviews** | **Postaward desk-audit reviews** | **Postaward onsite compliance reviews** | **Complaint investigations** | **Technical assistance** | **Outreach and education** | **Deficiencies, remedies, and sanctions** |
|---|---|---|---|---|---|---|---|
| DOE | Magnet schools assistance program only. General Education Provisions Act of 1994 gave DOE broad new authority to do preaward reviews. | None, except in conjunction with onsite compliance reviews. | Onsite compliance reviews a priority, but large number of complaints prevents DOE from doing many. Reviews based on priority issues chosen by Asst. Secretary based on strategic plan. DOE trying to increase number of reviews—44 Title VI reviews in FY 1993. | Escalating number of complaints—5,000 in FY 1993; one-quarter were Title VI. New complaints resolution manual published in 1993 in effort to enhance complaints processing efficiency. | Active program of technical assistance. Technical assistance targeted to priority issues chosen by Asst. Secretary based on strategic plan. | Active program of outreach and education. | Active use of enforcement tools, including negotiating voluntary compliance, administrative proceedings, and litigation. |
| HHS | Preaward reviews for new medicare facilities only. | Very few done. | Declining number of reviews—12 initiated in FY 1993. | Complaint-driven enforcement—more than three-quarters of OCR's resources. More than 1,000 complaints each year. HHS revising investigative procedures manual to streamline complaint processing. | Limited. | Limited, Community input obtained in preparation of HHS strategic plan. | Little use of administrative proceedings or litigation. |
| USDA FNS | Done for programs with high degree of recipient turnover only, e.g., ROAP programs. | No distinction made between desk-audit and onsite reviews; most are onsite. | States review recipients; FNS reviews States. | Memorandum of understanding with USDA/OCRE gives FNS responsibility of processing complaints and referring them to USDA/OCRE with a recommended finding. | Regional staff provide technical assistance to States. | Limited. | Limited. |

*(continued)*

**TABLE 15.4 (continued)**
**Federal Agencies' Title VI Enforcement Activity**

| | Preaward reviews | Postaward desk-audit reviews | Postaward onsite compliance reviews | Complaint investigations | Technical assistance | Outreach and education | Deficiencies, remedies, and sanctions |
|---|---|---|---|---|---|---|---|
| *USDA (continued)* | | | | | | | |
| FMHA | Done for water and waste facility loans and other utility projects only. | None. | Done by program personnel. One-third of recipients reviewed each year—6,000 reviews. | 153 complaints received in FY 1993. | Limited. | Limited. | No information provided. |
| SCS | Limited reviews by district conservationists. | No distinction made between desk-audit and onsite reviews. | 554 postaward reviews done in FY 1993. | One Title VI complaint received in FY 1993. | Upon request. | Active. | Limited. |
| HUD | 8,931 reviews in FY 1993; probably cursory reviews. | None. | Until recently, limited to public housing authorities. Small number of reviews (43 in FY 1993) compared to number of recipients (over 25,000). | Complaint workload dominated by fair housing complaints; 205 Title VI complaints received in FY 1993. | Limited. | Limited. | Recent increased activity. |
| DOL | None. | None. | Doing fewer Title VI compliance reviews—15 in FY 1993. | Number of Title VI complaints received decreasing—84 in FY 1993. New complaint intake unit and tracking system expected to improve complaint processing. | Limited. Recipients are required to do outreach and education for JTPA program. | Active technical assistance program for State and local staff. | Almost no use of administrative sanctions and litigation. |
| DOI | | | | Few Title VI complaints received. | Limited. | Regular provision of technical assistance to NPS, FWS, and BR. Otherwise on request to recipients. | Limited use of administrative sanctions and litigation. |

*(continued)*

**TABLE 15.4 (continued)**
**Federal Agencies' Title VI Enforcement Activity**

| | Preaward reviews | Postaward desk-audit reviews | Postaward onsite compliance reviews | Complaint investigations | Technical assistance | Outreach and education | Deficiencies, remedies, and sanctions |
|---|---|---|---|---|---|---|---|
| *DOI (continued)* | | | | | | | |
| NPS | Select programs. | None. | Done by program personnel. | | | | |
| FWS | None. | None. | Done by program personnel. | | | | |
| BR | None. | None. | Not yet done. | | | | |
| EPA* | Done for waste-water treatment and construction grants program only. Declining number of reviews—75 in FY 1993. | None. | None. | Receives very few Title VI complaints (2 in FY 1993) but has a backlog. Number of complaints may increase because of environmental justice initiative. | Limited. | Limited. | Limited. |
| SBA | None since 1980. | None since 1982. SBA maintains that Paperwork Reduction Act prohibits such reviews. | Done for companies with 15 or more employees only. | Very few Title VI complaints received—10 in FY 1993. | Provided upon request and during compliance reviews. | Limited. | Limited. |
| OJP | Limited. Preaward review program to be implemented for police hiring supplement program. | None. | None. | Complaint backlog decreasing—26 in FY 1993. Very few Title VI complaints received—13 in FY 1993. | Limited, except for police hiring supplement program. | Limited. | Limited. |

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*Does not include environmental justice activities except as related to Title VI.

*(continued)*

TABLE 15.4 (continued)
Federal Agencies' Title VI Enforcement Activity

| | **Preaward reviews** | **Postaward desk-audit reviews** | **Postaward onsite compliance reviews** | **Complaint investigations** | **Technical assistance** | **Outreach and education** | **Deficiencies, remedies, and sanctions** |
|---|---|---|---|---|---|---|---|
| DOT | | | Responsible for all complaints. Received 513 complaints in FY 1993; 36 (7%) were Title VI complaints. | Limited. | Limited. | | |
| FAA | Preaward reviews required for many projects, but only one review done in FY 1994, three in FY 1993. | None. | Very few reviews done—none in FY 1994, one in FY 1993. | Very few Title VI complaints received. | Limited, provided mainly during compliance reviews. | Limited. | Limited. |
| FHWA | None. | Not done except as part of onsite compliance reviews. | Does onsite reviews of State transportation agencies—43 in FY 1993. | Five Title VI complaints received in FY 1993. | Active technical assistance program for recipients. | Moderately active outreach and education program. | Limited. |
| FRA | 51 preaward reviews in in FY 1993. | No distinction made between desk-audit and onsite reviews. | Reviews done 1 year after release of financial assistance—25 compliance reviews in FY 1994. No onsite reviews of State agencies in past 5 years. | Five Title VI complaints received in FY 1993. | Limited. | No outreach and education done; Federal grants to State recipients for outreach and education. | None. |
| FTA | 847 desk-audit and 4 onsite reviews in FY 1993. | No distinction made between desk-audit and onsite reviews. | 241 reviews (226 desk-audit) in FY 1993. | Very few Title VI complaints received. | Provided on on request. | None. | None. |
| NHTSA | None since 1981. | None. | None. | None | None. | None. | None. |
| RSPA | 108 preaward reviews in FY 1993. | No distinction made between desk-audit and onsite reviews. | Done by RSPA program personnel. | Very few Title VI complaints received—none in FYs 1992/93. | Done by RSPA program personnel. | Done by RSPA program personnel. | None. |
| USCG | 73 desk-audit preaward reviews done in FY 1993. | No distinction made between desk-audit and onsite reviews. | No onsite compliance reviews done in past 5 years. | Few Title VI complaints received; one in FY 1992; none in FY 1993. | Limited. | Limited. | None. |

**Recommendation:** In general, all agencies must adopt more proactive enforcement methods to ensure that their Title VI enforcement programs are fully effective. Rather than relying solely on onsite reviews and complaint investigations, agencies should develop a tiered review process. The Commission recommends that agencies conduct thorough desk-audit screenings of applicants before the agencies grant Federal financial assistance. The Department of Justice has indicated that such reviews *do not include* routine reviews of assurance forms to ensure proper completion. Therefore, in addition to ensuring that all applicants have submitted assurance forms, agencies should review all data submitted by each applicant and should require an applicant to provide any necessary additional information to facilitate an accurate determination of compliance or noncompliance with Title VI. Through thorough preaward desk-audit reviews, agencies will identify discriminating applicants and other organizations and will eliminate any discriminatory practices before disbursing funds. Agencies also will identify applicants that require preaward onsite reviews and technical assistance in order to ensure compliance with Title VI.

Agencies should consider a variety of information at the preaward level, such as the applicants' prior histories of compliance with Title VI in federally assisted and federally conducted programs governmentwide, including pending applications for program funds at other Federal agencies, current discrimination suits filed against the applicant, and past denials, suspensions, or terminations of Federal funding. Other data should include: 1) implementation and enforcement policies and documents concerning specific compliance activities; 2) statistical evidence on program and activity participation rates by racial and ethnic minorities; 3) application or interview material related to acceptance or selection; 4) data and information related to the demographic makeup of the program's affected community or pool of potential participants; 5) statistical evidence related to rejection rates; and 6) community outreach and public education materials.

The Commission maintains that preaward reviews, both desk audit and on site, are important to a Title VI enforcement program. Agencies should conduct both reviews on all program applicants. In addition, DOJ's coordination regulations require a preaward review of all necessary data to determine compliance with Title VI. However, the Commission recognizes the budget and staffing limitations of agencies. The Commission also understands that a lengthy preaward process will delay program benefits and, consequently, impact on the ultimate beneficiaries. In light of these factors, the Commission recommends some alternative strategies that will promote a meaningful and efficient preaward process on as many applicants and recipients as possible, eliminating reliance on cursory preaward reviews. These strategies should serve only as a secondary alternative to the optimal preaward compliance review process described above. Although this alternative may not be the most effective at ensuring full enforcement of Title VI, it should allow agencies to have some type of meaningful preaward review mechanism without impacting critically on Title VI enforcement.

All agencies should use detailed assurance forms that provide a clear understanding of applicants' or recipients' status and intent in complying with Title VI. The Department of Justice should produce a model assurance form that will contain a minimum checklist of information. For example, the checklist will commit the applicants and recipients to confirming that no consent decrees or judicial findings of discrimination have been entered against them; that no Title VI complaints with cause findings have been determined against them; and that no findings of noncompliance with Title VI have been issued against them by any Federal, State, or local agencies, among other items. The applicants and recipients should specify on the form information on any pending compliance reviews or complaint investigations. The agencies should expand on this checklist depending on their particular program needs. Furthermore, the form should specify clearly that the assurance is provided as a condition of receipt of Federal funds; that failure to provide any requested information may result in suspension or termination of funds; that the applicant or recipient agrees to maintain records and submit reports on its programs; and that the applicant or recipient will require all subrecipients, subcontractors, or subgrantees to comply with Title VI.

As part of the preaward process, agencies also should consult the Equal Employment Opportunity Commission, the Office of Federal Contract

Compliance Programs, the Department of Justice, and any agency with which the reviewing agency has a delegation agreement or memorandum of understanding for information on the applicant. Agencies should compare this information with the assurances given on the assurance form to identify applicants in potential noncompliance with Title VI or those that require preaward onsite reviews, negotiations for voluntary compliance, or technical assistance. Until the Department of Justice can establish a governmentwide databank clearinghouse on recipients' histories of compliance with Title VI, this type of consultation with other agencies is necessary. (See finding and recommendation on pages 666 to 669 for discussion of databank clearinghouse.)

With respect to thorough desk-audit and onsite preaward reviews, the Commission recommends the following arrangement. Each agency should assess the number of first-time applicants and recipients of block grants, formula grants, categorical grants, and continuing programs on which it can reasonably expect to conduct thorough preaward reviews based on its resources and enforcement goals. It should establish a threshold percentage of the number of preaward reviews that it can conduct annually. Based on this percentage, the agency should develop a formula to select applicants or recipients for review. In selecting applicants and recipients for review, the agency should factor both the size of the grants to be received and other characteristics, such as the type of program or project to be funded. For example, programs that involve the funding of construction projects or siting decisions should be preaward review intensive. If an agency relies solely on postaward reviews, the building may be underway or the siting decision made before the agency has the opportunity to ensure compliance with Title VI. The agency should revisit its threshold percentage and formula regularly as part of the budgeting and planning process.

After the first-time preaward reviews, agencies should conduct preaward reviews of any continuing program or renewing program recipient that has not undergone pre- or postaward desk-audit or onsite reviews within a 2-year period. The Commission maintains that by improving assurance forms to identify potential noncompliance, consulting with other agencies on recipients' compliance status, and establishing this type of arrangement for preaward reviews, agencies will maintain a preaward compliance review approach that facilitates an effective Title VI enforcement program in light of limited budget and staff resources.

### *Postaward Desk-Audit Reviews*

**Finding:** Postaward desk-audit reviews are an extremely valuable enforcement tool that is rarely used by Federal agencies, to the detriment of their Title VI enforcement programs. Of the agencies reviewed, virtually none has an active postaward desk-audit review system for uncovering recipients with potential noncompliance.[168]

Postaward desk-audit reviews provide agencies with the opportunity to review recipients' program practices in less time and with fewer resources than onsite reviews. They also offer the agencies a means of deterring discrimination by targeting recipients in need of technical assistance, onsite investigation, or general modification of policies and procedures.

**Recommendation:** Once agencies grant Federal financial assistance to recipients, they must have a postaward compliance review process in place to ensure continuing recipient compliance with Title VI. Postaward desk-audit reviews should: 1) identify deficiencies in recipients' delivery of program services to potential and actual participants and beneficiaries of all races and ethnicities; 2) investigate allegations of discriminatory barriers to participation or disparate treatment in participation; 3) evaluate recipients' public education and program accessibility; and 4) identify recipients' needs for technical assistance or further onsite reviews. Agencies should tailor these reviews to the ways in which the Federal programs are administered or operated. For example, evaluation of State continuing and block grant programs involves assessments of the States' performance of civil rights enforcement activities. All desk-audit reviews, both preaward and postaward, must be reduced to a written summary stating specific findings and recommendations for achieving compliance.

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[168] DOEd, chap. 5, p. 198 (reviews data in conjunction with targeting recipients for onsite compliance reviews); HHS, chap. 6, p. 228 (performs limited scope reviews which combine features of desk-audit and onsite reviews); HUD, chap. 8, p. 335; FNS, chap. 7, pp. 281–82; FmHA, chap. 7, pp. 301–02; SCS, chap. 7, p. 315; DOL, chap. 9, p. 363; DOI, chap. 10, p. 397 (It reported that it performed only 8 desk-audit reviews in 1993.); EPA, chap. 11, p. 430; SBA, chap. 12, p. 462; OJP, chap. 13, p. 485; FAA, chap. 14, p. 530; FHWA, chap. 14, p. 547 (The FHWA does not conduct desk audits except as part of its onsite reviews.); FRA, chap. 14, pp. 558; NHTSA, chap. 14, p. 584; USCG, chap. 14, pp. 601–02. *But see* FRA, chap. 14, p. 71 (The FRA indicated that it conducts desk audits, but only of section 905 recipients.); FTA, chap. 14, p. 572 (The FTA reported that it conducted 226 desk-audit reviews in 1993.); RSPA, chap. 14, p. 594 (The RSPA indicated that it conducts desk-audit reviews of program offices.). *See* table 15.4.

In the face of reduced resources, a shift in emphasis towards pre- and postaward desk-audit reviews would allow the agencies to use existing resources to better effect. Comprehensive data collection systems will enable agencies to maintain for consideration applicant or grant renewal information, self-assessment reports, information on the applicant's or recipient's previous record of noncompliance governmentwide, and recommendations for corrective action, litigation, and pending applications. This information will facilitate meaningful and thorough desk-audit reviews. It also will allow agencies to target recipients for onsite reviews.

### *Postaward Onsite Compliance Reviews*

**Finding:** Unlike postaward desk-audit reviews, most agencies with a Title VI enforcement program of more than minimal proportions conduct at least some onsite compliance reviews.[169] Nearly all agencies regard onsite compliance reviews, along with complaint investigations, as their primary enforcement mechanism. Nevertheless, as available resources have declined, most agencies have substantially curtailed the number of onsite compliance reviews they complete each year in comparison to the number they performed before the mid-1980s.[170] Some agencies have even discontinued the use of onsite reviews in their Title VI enforcement programs.[171] Of the agencies that do conduct onsite compliance reviews, most reach only a minuscule proportion of their recipients each year.[172]

One agency, the Department of Education, has acknowledged that it can no longer conduct onsite compliance reviews as it did in the past. It has moved towards using them, not as an enforcement tool, but in conjunction with policy development and dissemination on specific Title VI issues. The Department uses onsite reviews of certain recipients as a form of technical assistance to serve as examples to other recipients of standards for compliance with Title VI.[173]

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[169] *See* DOEd, chap. 5, pp. 198–99; HHS, chap. 6, pp. 228–29; FNS, chap. 7, pp. 281–82; FmHA, chap. 7, p. 301; SCS, chap. 7, p. 315; HUD, chap. 8, pp. 335–36 (Until recently, HUD limited its Title VI onsite compliance reviews to public housing authorities.); DOL, chap. 9, p. 329; DOI, chap. 10, p. 398; SBA, chap. 12, pp. 462–63; FAA, chap. 14, p. 530 (The FAA conducted one onsite review in 1993, but none in 1992 and 1993.); FHWA, chap. 14, p. 547; FTA, chap. 14, p. 572; RSPA, chap. 14, p. 594. But see EPA, chap. 11, p. 430; OJP, chap. 13, pp. 495–96; NHTSA, chap. 14, p. 584; USCG, chap. 14, pp. 601–02. None of these agencies performs postaward onsite reviews. *See* table 15.4.

[170] DOEd, chap. 5, pp. 198–99; HHS, chap. 6, pp. 228–29 (In the 1980s, HHS conducted more than 100 onsite reviews; in fiscal year 1993, it completed only 21.); DOL, chap. 9, pp. 379–80 (Although the number of onsite reviews conducted by DOL's civil rights staff decreased from 147 in 1981 to 15 in 1993, DOL staff indicated that it intentionally reduced the numbers in order to improve the quality of the reviews.); FHWA, chap. 14, p. 547 (The Director of FHWA/OCR indicated that it does not have the resources to conduct a large number of onsite reviews.)

[171] FNS, chap. 7, pp. 281–82 (FNS relies on States to perform postaward reviews because of its lack of resources.); FAA, chap. 14, p. 530 (FAA's regional offices attributed their failure to conduct compliance reviews to limited resources and increased workload.); NHTSA, chap. 14, p. 584 (The NHTSA provided no evidence that it has conducted any onsite reviews in the last 12 years.). *See* table 15.4.

[172] *See* DOEd, chap. 5, p. 199 (In 1993, DOEd completed 44 onsite reviews, less than one-half of one percent of the Department's 25,000 recipients.); HHS, chap. 6, pp. 228–29 (In 1993 completed 21 onsite reviews relative to the 700,000 recipients it funds); HUD, chap. 8, pp. 335–36 (In 1993, it conducted only 43 onsite reviews in comparison to the over 25,000 recipients it funds.); DOL, chap. 9, pp. 379–80 (DOL's onsite reviews focus on the JTPA program, and, therefore, do not reach the Departments other programs.). But see FmHA, chap. 7, p. 302 (The FmHA conducts onsite reviews of approximately one-third of its recipients annually.).

**Recommendation:** A meaningful onsite compliance review program is an indispensable part of an effective Title VI enforcement program. No other enforcement tool can ever fully replace onsite compliance reviews, particularly with respect to uncovering more subtle forms of discrimination. Without onsite reviews, the Federal agencies will be unable to ensure fully that recipients of Federal financial assistance are in compliance with Title VI, and many occurrences of discrimination may remain unnoticed. All agencies should develop onsite review processes, and they should provide their civil rights offices with enough resources to mount an effective compliance review program, one that reaches 5 percent of recipients each year.

In the onsite review process, agencies first should consider the recipient's site for potentially discriminatory staff patterns or other potentially discriminatory employment or service practices. Second, staff should interview recipient officials, communities affected by the recipient's programs or activities, program participants or beneficiaries, and counselors responsible for assisting participants' and program beneficiaries' involvement. Third, staff should examine the recipient's compliance policies and practices for deficiencies and quality. Fourth, agencies should analyze statistical evidence on participation rates and application rejection rates. Fifth, agencies should evaluate efforts to educate the public and affected community of programs and activities, especially efforts to provide program accessibility information to limited-English proficient communities or otherwise disadvantaged communities. The reviews should be tailored to each type of Federal program, including State continuing and block grant programs.

In addition, the Federal agencies should use onsite reviews to provide technical assistance, to conduct outreach and education, and to identify issues for policy development. The review should involve both an assessment of the recipient's compliance efforts and discussions with community and advocacy groups, beneficiaries, and program participants to gain a fuller perspective of the recipient's civil rights compliance efforts.

### Complaint Investigations

**Finding:** Along with onsite compliance reviews, most agencies regard complaint investigations as the second major prong of their Title VI enforcement programs. Some agencies, such as the Department of Education[174] and the Department of Health and Human Services,[175] receive so many complaints annually[176] that they expend the bulk of their resources on complaint investigation. However, some agencies[177] receive few Title VI complaints each year.[178]

As with other Title VI enforcement activities, the decreasing availability of resources has impeded complaint investigations and processing. Some agencies[179] reported backlogs in their complaint processing. One agency indicated that the increasing inventory of complaints had created pressures to resolve complaints as quickly as possible, such as by closing cases administratively.[180] Many of these agencies[181] have adopted strategies, such as informal resolution systems, team approaches, and priority systems, to increase efficiency and reduce the backlogs. For example, the Department of Education issued a Complaint Resolution Manual. One component of the manual, the early complaint resolution system, encourages parties to resolve their differences independently of the agency's intervention. The Department of Education's civil rights staff reported that the manual has expedited complaint processing, since regional staff need not investigate unless the parties cannot agree. It also has enabled the Department of Education to increase its use of compliance reviews.

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[173] U.S. Department of Education, Office of the Assistant Secretary for Civil Rights, "National Enforcement Strategy, Office for Civil Rights, FYs 1991–1992," pp. 2–3, Dec. 11, 1990. *See* chap. 5, pp. 199–200.

[174] *See* chap. 5, pp. 198–99.

[175] *See* chap. 6, pp. 229–30 (HHS reported that it employs as much as three-fourths of its civil rights resources on complaint investigations.).

[176] *See* table 15.4.

[177] DOI, chap. 10, p. 399; EPA, chap. 11, pp. 431–32; OJP, chap. 13, pp. 486–87; FAA, chap. 14, pp. 530–31; FHWA, chap. 14, pp. 547–48. *See* table 15.4.

[178] *See* table 15.4. HUD, chap. 8, p. 336 (HUD received 161 Title VI complaints in 1993. Although it is not a small number of complaints, it is small relative to the 10,868 total complaints received in 1993.)

[179] DOEd, chap. 5, p. 201; HHS, chap. 6, pp. 229–30; EPA, chap. 11, pp. 430–32; OJP, chap. 13, pp. 486–87; DOT, chap. 14, p. 512.

As an additional example, the Department of Agriculture, despite its decentralized Title VI enforcement process, has retained ultimate responsibility for complaint investigations.[182] However, because of a growing backlog of complaints, it entered into a memorandum of understanding with an agency head, the Food and Nutrition Service. As a result, the Food and Nutrition Service investigates the complaints and, after a finding of noncompliance, tries to secure voluntary compliance. If its attempts fail, it refers the complaint to the Department of Agriculture's Office of Civil Rights Enforcement with a recommendation for corrective action. This system has reduced processing time from 175 days to 60 days.[183]

**Recommendation:** All agencies must eliminate complaint backlogs, processing and resolving complaints efficiently, without compromising efforts to conduct other equally important enforcement procedures, such as compliance reviews and staff training. All agencies should develop and implement early complaint resolution procedures and processes. The procedures and processes should be designed to eliminate layers of review by developing a strong intake process that screens frivolous complaints. These procedures and processes will promote a more efficient and less costly complaint investigation program because agencies, in the long run, will not have to devote as many resources to onsite investigations and agency intervention strategies. Agencies should formulate resolution strategies for complaints that meet the *prima facie* test to obtain early resolutions. Implementing strong screening mechanisms and focusing first on voluntary resolution efforts will enable agencies to reduce backlogs and to concentrate on the complaints of more subtle forms of discrimination.

Complaints that involve pattern and practice issues or an affected community should be investigated thoroughly. If a finding of discrimination exists in these situations, the agency should issue a letter of finding, and it should compel the recipient to comply voluntarily with Title VI. If the recipient refuses to resolve the matter within 90 days, all funds should be suspended temporarily until either a final decision is made by an administrative law judge, the Department of Justice, or the appropriate judicial branch of government.

Finally, since complaint investigations are reactive measures responding to discrimination that purportedly has already occurred, agencies should ensure that the proactive measures are not ignored. Through comprehensive desk-audit preaward reviews, agencies have an efficient means of identifying discriminating organizations before funding is distributed. Agencies can provide technical assistance to and place certain self-assessment requirements on recipients to ensure that they maintain compliance with Title VI. These proactive mechanisms facilitate a more effective Title VI program than one that is driven primarily by complaints and complaint investigations. The focus is on maintaining compliance and nondiscrimination rather than awaiting the complaint of discrimination.

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[180] *See* HHS, chap. 6, pp. 229–30.

[181] DOEd, chap. 5, p. 202; HHS, chap. 6, pp. 229–30; OJP, chap. 13, pp. 430–32.

[182] *See* chap. 7, p. 261.

[183] *See* chap. 14, p. 512.

### Deficiencies, Remedies, and Sanctions

**Finding:** Most agencies rely on negotiating voluntary compliance.[184] A few agencies explained that they rarely use administrative proceedings and litigation to resolve findings of noncompliance because they rarely issue such findings of noncompliance.[185] Although reliance on voluntary compliance efforts may be appropriate for mere technical deficiencies in recipients' Title VI enforcement efforts, it may be too lenient a response to findings of serious discriminatory practices.

The Department of Education actively uses enforcement tools to resolve deficiencies in recipient programs. It is the most active of all of the Federal agencies reviewed in initiating the administrative proceedings requisite to imposing sanctions on recipients and referring cases to the Department of Justice for litigation. For example, during 1993, the Department deferred funding to two recipients, and over the past 5 years, it initiated fund termination proceedings in five cases.[186] The Department also referred three cases to the Department of Justice in 1994, two of which involved Title VI.

**Recommendation:** All Federal agencies must develop followup mechanisms to voluntary compliance efforts to ensure that recipients, State and local agencies, and other institutions maintain their commitments to correct Title VI deficiencies. This followup review process should involve both continuous monitoring and provision of technical assistance until compliance is achieved in full. Agencies' civil rights offices should compile this monitoring information in a database system so that agencies have histories on specific recipients, State and local agencies, and other entities' compliance with Title VI. This system will facilitate effective monitoring and assist the agency in determining when administrative or judicial actions would be most appropriate.

### Outreach and Education

**Finding:** Only a few of the Federal agencies[187] and subagencies[188] reviewed in this report have active outreach and education programs. The remainder of the agencies perform only very limited,[189] and in some cases virtually nonexistent,[190] outreach and education activities. For example, few agencies[191] provide outreach to community organizations. The lack of strong outreach and education programs in these agencies is a serious deficiency in their Title VI enforcement efforts.

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[184] DOEd, chap. 5, pp. 202–03; HHS, chap. 6, pp. 230–31 (Resolves many findings of noncompliance with corrective action commitments. HHS Survey, Q. 69, pp. 51–53.); HUD, chap. 8, pp. 336–37 (Did not execute any Title VI administrative proceedings or enforcement actions, nor did it refer any Title VI cases to the Department of Justice for litigation in 1992 or 1993.); DOL, chap. 9, pp. 364–65; SBA, chap. 12, pp. 464–65; FNS, chap. 7, pp. 283–84; SCS, chap. 7, p. 315; FTA, chap. 14, p. 573. DOI, EPA, and OJP provided no indication because they receive so few complaints or rarely find recipients in noncompliance. *See* chap. 10, p. 400; chap. 11, p. 432; and chap. 13, p. 487. The other subagencies provided no indication.

[185] *See* DOI, chap. 10, p. 400; EPA, chap. 11, p. 432; OJP, chap. 13, p. 487. *See also* table 15.4.

[186] Raymond C. Pierce, Deputy Assistant Secretary, Office for Civil Rights, U.S. Department of Education, letter to Frederick D. Isler, Deputy Assistant Staff Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, May 9, 1994, attachment, "Office for Civil Rights Responses to Questions," pp. 5–6. *See* chap. 5, p. 25.

[187] DOEd, chap. 5, pp. 202–03. *See* table 15.4.

[188] FNS, chap. 7, p. 284; SCS, chap. 7, pp. 315–17; FHWA, chap. 14, p. 548. *See* table 15.4.

[189] *See* HHS, chap. 6, pp. 231–32; USDA, chap. 7, pp. 261–62; DOL, chap. 9, p. 365; DOI, chap. 10, pp. 400–01; EPA, chap. 11, pp. 433–35; OJP, chap. 13, p. 481; FRA, chap. 14, p. 559. *See also* table 15.4.

[190] DOT, chap. 14, p. 512; FTA, chap. 14, pp. 573–74; NHTSA, chap. 14, p. 585. *See* table 15.4.

[191] DOEd, chap. 5, p. 203; USDA, chap. 7, pp. 265–66; SCS, chap. 7, pp. 315–17; HUD, chap. 8, pp. 337–38 (HUD, through its FHIP program, provides funds to community groups and fair housing agencies for outreach and education activities.); FHWA, chap. 14, pp. 548–49. HHS provided no indication that it routinely had meetings with community organizations; however, its new Strategic Plan makes community liaison activities a priority. *See* chap. 6, pp. 231–32.

Among the agencies that do have outreach and education programs, most concentrate their efforts on civil rights laws other than Title VI. Most agencies[192] provide informational literature and posters in Spanish as well as English. A few agencies[193] publish information in other languages.

The methods used to disseminate information vary among the agencies. One agency's only requirement is the display of a poster that presents the nondiscrimination provisions.[194] Some agencies publish pamphlets informing the public about their rights under Title VI.[195] Some agencies conduct workshops or conferences to instruct groups affected by Title VI.[196] Other agencies[197] rely on media communications.

Two of the Federal agencies reviewed in this report have particularly active outreach and education programs. The Department of Housing and Urban Development provides funds to community groups and fair housing agencies for various outreach and education activities under its fair housing initiatives program. This funding has enabled community groups and fair housing agencies to mount media campaigns informing the public about their rights under fair housing laws, develop educational materials for and provide seminars on fair housing, and design other special projects.[198] Through training workshops, newsletters, focus group meetings, and round table discussions, the Department of Education structures its outreach and education program to provide ongoing information to educators, administrators, policy makers, parents, students, and affected communities. [199] Its outreach and education program is the most active in providing information specifically on Title VI.

**Recommendation:** Because educating the public on Title VI rights and complaint procedures can increase the number of legitimate discrimination complaints, Federal agencies must devote sufficient resources to develop active outreach and education programs. These programs should not consist merely of requirements for recipients and State and local offices to display posters and distribute informational pamphlets. Federal agencies should take affirmative measures to reach out to beneficiaries, actual and potential program participants, affected communities, and advocacy groups. Federal agencies should follow the models of the Departments of Education and Housing and Urban Development. They should encourage focus group meetings and roundtable discussions and provide funds to community groups and local agencies for outreach and education activities. This interaction with the local communities will assist the agencies in identifying contemporary issues involving Title VI. It will provide agencies with some means of self-assessment if individuals have opportunities to express their views on civil rights enforcement efforts. It also will assist agencies in identifying recipients for onsite reviews. By providing funding to community organizations and local agencies for outreach and education activities, the Federal agencies will ensure that at the local level individuals are informed of their rights under Title VI. By developing active, comprehensive outreach and education programs, agencies will create proactive Title VI enforcement programs, rather than relying on complaints to direct the enforcement process.

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[192] DOL, chap. 9, p. 365; DOI, chap. 10, pp. 400–01; EPA, chap. 11, pp. 433–35; SBA, chap. 12, pp. 465–66; USDA, chap. 7, pp. 461–62; FNS, chap. 7, p. 284; SCS, chap. 7, pp. 315–16; FAA, chap. 14, p. 531.

[193] FNS, chap. 7, p. 284 (Chinese and Japanese); SCS, chap. 7, pp. 315–17 (Vietnamese, Chinese, Korean, Filipino, Hawaiian, Punjabi, Hmong). The SCS has a very successful program in reaching the needs of individuals with limited English proficiency. When a request is made for information in non-English language, the SCS attempts to respond immediately.

[194] FmHA, chap. 7, pp. 302–03.

[195] DOEd, chap. 5, p. 203; USDA, chap. 7, pp. 261–62; FNS, chap. 7, p. 284; DOI, chap. 10, pp. 400–01; EPA, chap. 11, pp. 433–35; FHWA, chap. 14, pp. 548–49.

[196] DOEd, chap. 5, p. 203; FHWA, chap. 14, pp. 548–49.

[197] SCS, chap. 7, pp. 315–17; SBA, chap. 12, pp. 465–66.

[198] *See* chap. 8, pp. 337–38.

[199] *See* chap. 5, pp. 203–04.

### Technical Assistance

**Finding:** The Department of Justice encourages Federal agencies to provide civil rights technical assistance and training to recipients.[200] The Commission found that most Federal agencies reviewed in this report[201] do provide some form of technical assistance. However, some agencies[202] make only minimal efforts to do so. At least one agency[203] provides technical assistance only upon request to State and local agency staff, and it does not provide technical assistance to recipients. Many of the agencies provide technical assistance in the form of training, workshops, or seminars.[204] They generally offer this assistance to State and local agency staff and recipients both on request and at the Federal agencies' initiative. However, some agencies[205] provide technical assistance to recipients only upon request. Only a few agencies[206] provide technical assistance to individuals or entities other than program recipients and State and local staff.

The Commission found that some agencies were particularly active in this area.[207] For example, in fiscal year 1993, the Department of Education's Office for Civil Rights (OCR) provided technical assistance to recipients on 646 occasions, of which 148 OCR initiated without requests.[208] It targeted not only State and local agencies and program recipients, but also professional associations and program beneficiaries. Rather than using desk-audit reviews to identify recipients in need of technical assistance, the Department of Education's OCR takes the initiative to provide technical assistance training to recipients on certain high priority issues,[209] and its regional civil rights offices provide technical assistance to recipients through training and workshops.[210] The Small Business Administration has made technical assistance an area of concentration in its external civil rights compliance and enforcement activities.[211] Although it does not offer training seminars for recipients, it provides

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[200] *See* chap. 4, pp. 177–78.

[201] DOEd, chap. 5, p. 204; HHS, chap. 6, pp. 231–32; USDA, chap. 7, p. 262; HUD, chap. 8, pp. 337–38; DOL, chap. 9, p. 366; DOI, chap. 10, p. 401; EPA, chap. 11, pp. 433–35; SBA, chap. 12, p. 466; OJP, chap. 13, p. 487, DOT, chap. 14, pp. 512–13. Of the subagencies, FNS, chap. 7, p. 285; FmHA, chap. 7, p. 303; SCS, chap. 7, p. 317; FAA, chap. 14, pp. 531–32; FHWA, chap. 14, p. 549; FRA, chap. 14, pp. 559–60; FTA, chap. 14, pp. 573–74; RSPA, chap. 14; p. 594; USCG, chap. 14, pp. 602–03. *See* table 15.4.

[202] HHS, chap. 6, pp. 231–32; HUD, chap. 8, pp. 337–38; EPA, chap. 11, pp. 433–35. *See* table 15.4.

[203] OJP, chap. 13, p. 487.

[204] DOEd, chap. 5, p. 204; HUD, chap. 8, pp. 337–38; DOL, chap. 9, p. 366; DOT, chap. 14, pp. 512–13; FNS, chap. 7, p. 285; FmHA, chap. 7, p. 313; FHWA, chap. 14, p. 549.

[205] FmHA, chap. 7, p. 303; SCS, chap. 7, p. 317;

[206] DOEd, chap. 5, p. 204; SBA, chap. 12, p. 466 (to the small business community and others).

[207] *See* DOE, chap. 5, p. 204; USDA, chap. 7, p. 262. The Food and Nutrition Service conducts "periodic" training seminars with State level program officials who have responsibility for delivering Federally assisted programs.

[208] U.S. Commission on Civil Rights, Survey of Federal Executive Branch Departments and Agencies Responsible for the Enforcement of Title VI of the Civil Rights Act of 1964, December 1993, completed by the U.S. Department of Education, Q. 54, p. 36. *See* chap. 5, p. 204.

[209] Lim and Bowers January 1995 interview, p. 3. *See* chap. 5, p. 204.

[210] Lim and Bowers September 1994 interview, p. 5. *See* chap. 5, p. 204.

[211] *See* chap. 12, p. 466. The SBA's activities in technical assistance have not concentrated on Title VI, rather other civil rights laws. However, its efforts provide useful examples for providing technical assistance on Title VI.

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assistance by telephone and through personal consultation meetings. Furthermore, it has instituted a process for reporting and recording the numbers and types of assistance offered and requested.

**Recommendation:** Because providing technical assistance offers an additional means to inform recipients and the general public about Title VI rights and requirements and because it serves as a cost-effective mechanism to secure voluntary compliance and reduce the necessity for compliance reviews, all agencies must develop and implement active technical assistance programs. Agencies should offer technical assistance both on their own initiative and on request. These efforts will ensure that agencies maintain proactive Title VI implementation and enforcement programs, rather than relying on complaints to direct the enforcement process. Agencies should make available to recipients periodic workshops, conferences, or seminars on various Title VI-related issues, such as organizing advisory or planning boards and establishing comprehensive systems of data collection and analysis.

In their efforts at collecting and analyzing data from recipients and conducting reviews, agencies should ascertain the areas and aspects of the Title VI requirements on which State and local recipients would need technical assistance. This information will provide topical ideas for workshops and conferences. Furthermore, by analyzing trends in technical deficiencies or other findings of noncompliance, agencies will identify whether sample forms, technical assistance manuals, revised procedure manuals, or new guidelines are necessary.

### Staff Training

**Finding:** Just as outreach, education, and technical assistance are essential for informing recipients and members of the public about Title VI, a comprehensive staff training program is essential for informing Federal agency civil rights staff about the provisions of Title VI and methods of enforcing them. However, the Commission found that none of the agencies reviewed is ensuring that its staff is trained regularly and effectively in Title VI. Some agencies provided no indication that they offered any type of training to their staff in recent years.[212] At least one agency[213] explained that it had not provided staff training for the past 3 years because of reductions in its budget.

Most agencies provide immediate training for new staff. This training may involve formal instruction on compliance activities,[214] or it may be limited to informal on-the-job training[215] and occasional seminars for other staff members.[216] Of the agencies that provide training to their staff members, most offer some form of formal training although they did not specify how frequently it occurred. Two agencies conduct training for their staff annually.[217] At least one agency[218] conducted training seminars semi-annually, and one[219] planned to offer quarterly inservice training to its field staff.

The Department of Labor's staff training program was among the best of the agencies reviewed in this report. It conducts an ongoing training program that is the responsibility of a training officer in the Office of the Director of Civil Rights. The training includes instruction on computer, writing, and management skills, as well as briefings and seminars on the Department of Labor's programs and new developments in civil rights laws. However, it has not conducted training specifically on Title VI.[220] Although one agency, the Office of Justice Programs,[221] has provided agencywide training for its grant managers to educate them on Title VI and include them in enforcement efforts, none of the Federal agencies or subagencies reviewed provides regular training specifically on Title VI.[222]

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[212] SBA, chap. 12, pp. 466–67; FRA, chap. 14, p. 560; NHTSA, chap. 14, p. 586; RSPA, chap. 14, p. 595 (Although RSPA usually provides on-the-job training to new staff, it has provided no training to any of its civil rights staff since 1992.); USCG, chap. 14, p. 596.

[213] SBA, chap. 12, pp. 466–67.

[214] *See* USDA, chap. 7, pp. 262–63; SCS, chap. 7, p. 319; DOI, chap. 10, p. 402; OJP, chap. 13, p. 488; DOT, chap. 14, p. 513.

[215] *See* HHS, chap. 6, pp. 232–33; SBA, chap. 12, pp. 466–67; FHWA, chap. 14, p. 550.

[216] DOEd, chap. 5, p. 206; HHS, chap. 6, p. 232;

[217] FNS, chap. 7, p. 285; HUD, chap. 8, p. 339.

[218] SCS, chap. 7, p. 319.

[219] FmHA, chap. 7, p. 303.

**Recommendation:** The Federal agencies must invest in the professional development needs of their external civil rights staffs to assure that staff members possess skills in investigative techniques, desk-audit and statistical analyses, negotiations, dispute resolution, and theories of discrimination relative to Title VI. Training in these areas will ensure cost-effective performance of staff members. Otherwise, the lack of trained and highly skilled staffs creates ineffective civil rights enforcement.

For these reasons, all Federal agencies should institute ongoing training programs within their primary civil rights offices similar to the Department of Labor's program and, similarly, headed by a training officer. The programs should cover investigative skills, desk-audit and statistical analyses, onsite reviews, and negotiation and dispute resolution strategies. The training programs also should instruct staff on legal developments regarding civil rights statutes and implications of the Civil Rights Restoration Act on Title VI. The training programs should establish performance standards to ensure that staff are performing their duties in efficient and effective manners.

The Federal agencies should include in their staff training programs instruction on the types of programs administered by the agencies with explanations of how they operate and of the types of beneficiaries, program participants, or other individuals affected by the programs. This instruction will give the civil rights staff a greater understanding of the Title VI enforcement process in the context of the Federal programs. The agencies also should inform staff regularly of developments in the law, such as updates of agencies' policies, new case law, amended statutes, or revised regulations, that affect Title VI compliance and enforcement.

Agencies should coordinate or consolidate efforts to provide ongoing training to all agencies' civil rights staff to the extent feasible. Rather than each agency hiring its own consultants to instruct staff on enforcement issues, all agencies could sponsor workshops on particular enforcement activities or Title VI law and developments that all Federal and State civil rights staff would attend. These governmentwide workshops would enable different agencies' civil rights staffs to discuss enforcement strategies and identify measures to improve their Title VI enforcement programs. In the alternative, agencies should encourage Congress to create, either within the Department of Justice or as an independent body, a center for comprehensive civil rights enforcement training.

## Oversight, Coordination, and Monitoring of Decentralized Title VI Enforcement Activities

**Finding:** The Commission identified three agencies having decentralized Title VI enforcement programs, the Departments of Agriculture, Interior, and Transportation.[223] The primary civil rights offices of these agencies have the responsibility of overseeing, coordinating, and monitoring the Title VI enforcement efforts of their various subagencies. The Commission found that, at one time, the Department of Agriculture's primary civil rights office had a particularly effective system for performing its oversight, coordination, and monitoring role. It assigned desk officers to each USDA agency head to conduct ongoing reviews of the agency heads' civil rights implementation and enforcement programs. The desk officers were responsible for, on an ongoing basis, reviewing agency heads' civil rights regulations, directives, and guidelines; performing desk-audit reviews, as appropriate; monitoring the adequacy and timeliness of corrective actions; and evaluating all USDA Civil Rights Implementation Plans. They also provided technical assistance and guidance to USDA civil rights staff through training and answering questions relating to compliance and complaint problems.[224]

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[220] *See* DOL, chap. 9, pp. 368–69.

[221] OJP, chap. 13, p. 488.

[222] DOEd, chap. 5, p. 206; HHS, chap. 6, pp. 232–33.

[223] USDA, chap. 7, pp. 262–63; DOI, chap. 10, pp. 387–95; DOT, chap. 14, pp. 501–02. The Department of Health and Human Services' Title VI responsibilities are partially decentralized. *See* HHS, chap. 6, pp. 219–20.

However, the Commission determined that currently all three Federal agencies' oversight and monitoring systems are deficient in some respects. The Department of Agriculture has the foundation for a strong oversight and monitoring program. For example, its compliance review manual requires its Office of Civil Rights Enforcement (OCRE) to evaluate each agency head at least once every 5 years.[225] OCRE is responsible for evaluating the program participation data collected and analyzed by the agency heads as a regular part of the review to ensure that the agency heads' data collection and analysis systems meet the departmental standards.[226] However, OCRE has neglected to conduct compliance reviews of all the subagencies.[227] The Department of Interior fails to assess the quality of its subagencies' enforcement activities.[228] The Department of Transportation has abdicated altogether its responsibility of providing leadership and guidance to the modal administrations and ensuring that they enforce Title VI adequately.[229]

Some agencies are more active in coordinating and assisting their subagencies. For example, although the Department of Agriculture no longer has desk officers to provide technical assistance and guidance to agency heads' civil rights staff, its Office of Civil Rights Enforcement still provides technical assistance to 13 agency heads onsite, by telephone, or through formal training sessions. It does so upon request of the agency head. It also may provide technical assistance after finding a need during an evaluation of the agency head or on its own recognition of an agency head's need for information.[230] Although OCRE does not collect data on the Department of Agriculture's federally assisted and conducted programs during its compliance reviews, it evaluates agency heads to ensure that their data collection and analysis systems meet the departmental regulations.[231] The Department of Interior's primary civil rights office provides its bureaus with technical assistance on a regular basis.[232] However, none of these agencies with decentralized Title VI enforcement programs has been active in disseminating policy statements and offering policy guidance in recent years.

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[224] USDA/OCRE FY 1990 Implementation Plan, pp. 8–9. The Department abolished these positions because low staffing levels prevented specialists from concentrating on only one agency. David Montoya, Director, Office of Civil Rights Enforcement, U.S. Department of Agriculture, letter to Frederick D. Isler, Acting Assistant Staff Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, July 5, 1994 (hereafter cited as Montoya July 1994 letter), attachment, Q. 10. *See* chap. 7, pp. 260–61.

[225] USDA/OCRE (OAE), Civil Rights *Compliance Review Manual*, p. 29.

[226] Montoya July 1994 letter, attachment, Q. 8. *See* chap. 7, p. 263.

[227] The Department of Agriculture's Office of Civil Rights Enforcement has not conducted compliance reviews of most of the agency heads over the past 2 years. Montoya July 1994, letter, attachment, Q. 11.

[228] Fowler interview, p. 2. *See* chap. 10, p. 396.

[229] The Department of Transportation's Office of Civil Rights's has not issued policy statements concerning Title VI in recent years. *See* chap. 14, p. 511. It has not provided any oversight or monitoring of the modal administrations for at least the last 5 years. *See* Burton Taylor, Deputy Director of Civil Rights, U.S. Department of Transportation, interview in Washington, D.C., Oct. 20, 1994, p. 2. *See* chap. 14, p. 509. In addition, it does not supervise enforcement of data collection requirements. *See* chap. 14, pp. 513–14.

[230] Montoya July 1994 letter, attachment Q. 18. *See* chap. 7, p. 262.

[231] *See* chap. 7, p. 263.

**Recommendation:** Agencies with decentralized Title VI enforcement programs must conduct thorough self-assessments of their programs to ensure that the decentralized structure allows for the most effective and efficient means of enforcing Title VI. Centralization and consolidation of their external civil rights enforcement efforts may be the better option if these agencies' primary civil rights offices do not actively conduct oversight, coordination, and monitoring of their subagencies. The agencies should impose on their subagencies reporting requirements that allow the agencies' primary civil rights offices to conduct comprehensive desk-audit evaluations of the subagencies' civil rights enforcement programs. Onsite evaluations should occur regularly and supplement the desk-audit process. Both the desk-audit and onsite reviews should focus on evaluating the quality of subagencies civil rights enforcement efforts.

The agencies' primary civil rights offices also should actively assist in each subagencies' planning efforts. During planning workshops or meetings between the civil rights offices, the agency's primary civil rights office can share strategies and programs that it recognizes as outstanding or exemplary among the subagencies' programs. This information will provide subagencies with greater creativity to improve their civil rights programs' efficiency and effectiveness.

## Oversight of Continuing State Programs

**Finding:** Most Federal agencies dispense a large proportion of their funds through continuing State programs, including block grant programs.[233] For these programs, States are given certain Title VI compliance responsibilities.[234] DOJ's coordination regulations, the Commission's *Compliance Officer's Manual*, and the agencies' regulations specify these responsibilities. At a minimum, States must submit assurances that they are in compliance with Title VI and methods of administration showing how they will ensure compliance on the part of their subrecipients.[235] However, the Commission found that none of the agencies reviewed provides States with comprehensive guidance on their responsibilities or effectively monitors the States' compliance programs. The Department of Labor is a partial exception. It has provided States with detailed guidelines on their methods of administration for the JTPA program.[236]

The Commission determined that Federal agencies and subagencies' efforts at overseeing and monitoring Title VI enforcement activities of State agencies have been limited,[237] if not nonexistent.[238] For example, some agencies[239] rely primarily on desk-audit reviews of methods of administration, statements of compliance, or annual reports. Five of the Federal agencies and subagencies[240] reviewed do not conduct onsite reviews of State agencies and recipients to evaluate their performance in conducting Title VI compliance and enforcement activities. Consequently, these agencies cannot observe and assess the quality of States' actual efforts, or lack of efforts,[241] in performing reviews of subrecipients, investigating complaints, collecting and analyzing data, and providing technical assistance. However, other agencies[242] rely heavily on comprehensive onsite reviews. For example, the Soil Conservation Service in the Department of Agriculture performs indepth, targeted oversight reviews of States on a 5-year cycle. Each review takes approximately 3 to 4 months to complete.[243]

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[232] *See* chap. 10, p. 401.

[233] *See* HHS, chap. 6, p. 232 (It operates numerous block grant programs.); DOL, chap. 9, p. 366 (It distributes most assistance through State continuing programs.); EPA, chap. 11, p. 435 (It distributes 80 percent of assistance through State agencies and State Revolving Funds.); NHTSA, chap. 14, p. 585 (All of its recipients are State agencies.).

[234] *See* chap. 4, pp. 178–79.

[235] 28 C.F.R. § 42.410 (1994).

[236] *See* chap. 9, pp. 366–67.

[237] *See* HHS, chap. 6, p. 232; FRA, chap. 14, p. 560; FTA, chap. 14, p. 574; NHTSA, chap. 14, p. 585.

[238] *See* EPA, chap. 11, p. 435; OJP, chap. 13, p. 488; DOT, chap. 14, p. 513; USCG, chap. 14, p. 603.

[239] DOEd, chap. 5, pp. 204–05; DOL, chap. 9, pp. 366–67; FTA, chap. 14, p. 574; FRA, chap. 14, p. 560; FHWA, chap. 14, pp. 549–50.

As with other enforcement activities, the decreasing availability of budget and staffing resources for civil rights enforcement may explain Federal agencies' failures to conduct onsite reviews of State continuing program recipients, especially if the standards for quality reviews are as thorough and time-consuming as those of the Soil Conservation Service.[244] However, limited resources should not necessitate a complete abandonment of onsite reviews. For example, at least one agency[245] relies primarily on desk-audit reviews of State agencies' self-assessment reports, but it also conducts onsite reviews if the reports indicate a problem in a particular State agency's enforcement program.

At least two Federal agencies[246] have dealt with the decrease of resources for their civil rights offices by shifting Title VI enforcement responsibility and some oversight and monitoring responsibilities to the States. The Food and Nutrition Service in the Department of Agriculture gives States responsibility for conducting self-assessments to ensure that they comply with Title VI.[247] The Department of Labor is following a deliberate strategy of increasing its reliance on State compliance programs. With respect to its JTPA-funded programs, the Department of Labor gives State's Governors responsibility for oversight, including ensuring compliance with Title VI and negotiating voluntary compliance. Equal opportunity officers, whom States must designate, carry out these responsibilities. More important, the Department of Labor requires States to bear the expense of training these officers and to give these officers sufficient resources to do their jobs.[248] However, other than the Department of Labor, none of the agencies reviewed requires States to have adequate resources to ensure that they can meet their Title VI responsibilities. Furthermore, none of the reviewed agencies has negotiated a formal agreement with States explicitly delegating Title VI enforcement responsibilities to the States.

**Recommendation:** All Federal agencies should provide comprehensive guidance to States on their responsibilities for performing Title VI activities, including technical assistance in developing procedures and staff training manuals and communications on new developments in Title VI law and Federal policies. Federal agencies should issue specific guidelines that outline frameworks for State-level Title VI enforcement programs. Furthermore, Federal agencies should provide guidance on how States can tailor their methods of administration to the types of programs they administer.

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[240] HHS, chap. 6, p. 232; DOL, chap. 9, pp. 316–17; FRA, chap. 14, p. 560; FTA, chap. 14, pp. 572–73; NHTSA, chap. 14, p. 585.

[241] At least one agency, the NHTSA, acknowledged that State continuing programs receiving its funds were not performing any compliance activities other than signing statements of assurances. *See* chap. 14, p. 585.

[242] FmHA, chap. 7, p. 303 (The FmHA's primary civil rights office audits all States within a 3-year period by team visits.); SCS, chap. 7, pp. 317–18 (State conservationists provide annual reports of States' activities to the SCS's primary civil rights office, which reviews the reports and reports to State conservationists any corrective actions that should be taken. The primary civil rights office has a schedule for onsite reviews of States based on a 5-year cycle. Each review takes 3–4 months to complete.).

[243] *See* chap. 7, p. 260.

[244] *See* FRA, chap. 14, p. 560.

[245] FNS, chap. 7, pp. 285–86.

[246] FNS, chap. 7, p. 285; DOL, chap. 9, pp. 366–67.

[247] *See* chap. 7, pp. 285–86.

[248] *See* chap. 9, pp. 366–68.

States must submit methods of administrations that provide detailed indication of how the State will ensure compliance with Title VI and correction of any compliance problem. The methods of administration must include, at a minimum: 1) a specific public outreach and education plan for notifying beneficiaries and potential beneficiaries of the Title VI requirements that apply to the federally funded State program; 2) training for State or local program staff and subrecipients in the Federal agency's nondiscrimination policies and procedures; 3) procedures for processing complaints, notifying the Federal funding agency, and informing beneficiaries of their right to file a complaint; 4) a program to assess and report periodically on the status of Title VI compliance that goes beyond a mere checklist of activities and assurances; and 5) detailed plans for bringing discriminatory programs into compliance within a specified time period.

Since continuous, comprehensive onsite reviews may not be a feasible option for many agencies, each agency should evaluate its resource needs. At a minimum, each agency should institute a meaningful method of desk-audit reviews rather than cursory checks for submissions of methods of administration and statements of assurances. Agencies should require other data, such as State recipients/agencies' self-assessment reports that identify past goals and objectives, accomplishments and failures, and future plans. Through these State self-studies, Federal agencies can assess more clearly State agencies' actions or inaction, and they can discern whether States' commitments to civil rights enforcement are merely superficial attempts or earnest efforts. These reviews also should serve as a screening process for onsite review candidates and, consequently, limit the number of onsite reviews that agencies must conduct, reduce costs, and increase the availability of resources for other compliance and enforcement activities. If desk-audit reviews reveal problems in an enforcement program, onsite reviews should serve as a second evaluation prong. In these situations, onsite reviews should involve a comprehensive and indepth evaluation of a State's Title VI enforcement efforts.

The Federal agencies also should implement an active system of regularly monitoring States' data collection and analysis programs. Preferably, States should maintain computerized databases of data enabling them to transfer data to a Federal database. By using computerized data collection and storage processes, States can assist Federal agencies in creating a comprehensive, consolidated data bank that tracks the histories of each recipient's compliance record governmentwide.

To ensure that a clear division of responsibility exists between Federal and State agencies, Federal agencies should use delegation agreements to assign Title VI responsibilities formally to State agencies. Like the Department of Labor's arrangement, those agreements should require States to designate a State officer who will be held accountable to the Federal agencies for State agencies' Title VI enforcement programs and for reporting all necessary data to the Federal agencies' civil rights offices.

Finally, to assist Federal and State agencies in fulfilling their civil rights enforcement responsibilities in federally assisted State continuing programs, Congress must consider the resources necessary to implement, monitor, and enforce Title VI and other civil rights laws. In creating or reauthorizing State continuing or block grant programs, Congress must appropriate funds to meet civil rights enforcement needs.

### Data Reporting Requirements and Collection and Analysis

**Finding:** Effective Title VI enforcement requires agencies to collect and analyze data on a regular basis to assist agencies in determining whether programs are conducted in a nondiscriminatory manner.[249] Collection and review of data is necessary to ensure that all segments of the population regardless of race, color, or national origin have equal access to Federal financial assistance programs. However, most of the Federal agencies reviewed in this report do not have an adequate system for collecting, analyzing, and using data for the purposes of Title VI enforcement. For example, some agencies[250] do not require recipients to develop a system for collecting base data. In fact, some of the agencies reviewed do not have their own system for data collection and analysis, nor do they regularly collect or review data on their recipients.[251] At least one agency[252] was sued by an African American plaintiff, supported by a coalition of civil rights groups and other organizations, seeking to compel the collection of data and information sufficient to allow effective enforcement of Title VI.[253]

Although some of the agencies do have a system for collecting and analyzing data, their efforts in this area are deficient in some respects. In particular, some agencies collect participation data on their federally assisted programs, but they do not gather data on eligible participants[254] or demographic data[255] to make comparisons with actual program participation.

Three agencies and one modal administration, however, stand out as having made significant attempts to integrate data collection and analysis into their Title VI enforcement programs. The Department of Education regularly conducts civil rights surveys of elementary and secondary schools and institutions of higher education. It uses them in its Title VI compliance review program. It also actively collects data on both program participants and potential participants to identify Title VI violations not only in program operations but also in admission and recruitment practices.[256] The Department of Labor's JTPA program recently instituted a data collection system, called the Standard Program Information Record (SPIR), that could serve as a useful model for other agencies. SPIR allows the Department of Labor to conduct indepth analyses by race/ethnicity of the participants in JTPA-funded programs and the services they receive. Although SPIR could be improved by requiring information on applicants to be entered into the system, it is far superior to the data collection systems of any other agency. It provides abundant information that can be used to great effect in desk-audit reviews and in the selection of onsite compliance reviews.

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[249] *See* chap. 4, pp. 180–81.

[250] SCS, chap. 7, p. 31922; DOI, chap. 10, pp. 403–04; SBA, chap. 12, pp. 467–68; FAA, chap. 14, pp. 532–33; NHTSA, chap. 14, p. 586; RSPA, chap. 14, p. 595.

[251] HHS, chap. 6, pp. 233–34; SBA, chap. 12, pp. 467–68; OJP, chap. 13, pp. 488–89 (It does not regularly collect data other than that found in State and local agencies' equal employment opportunity plans and applications for assistance under the police supplement hiring program.).

[252] HHS, chap. 6, pp. 233–34.

[253] First amended and supplemental complaint at 18, Madison-Hughes v. Shalala, Civil Action 3:93 0048, p. 18 (M.D. Tenn. June 4, 1993). *See* chap. 6, pp. 233–34.

[254] FNS, chap. 7, pp. 268–87; FmHA, chap. 7, p. 304; FRA, chap. 14, pp. 560–61 (It was unclear whether the FRA requires recipients to collect eligibility data; however, the FRA does not require recipients to submit annual reports comparing program participation with program eligibility.); RSPA, chap. 14, p. 595 (Like the FRA, although it was unclear whether RSPA recipients collect eligibility data, the RSPA does not require a report comparing program participation with eligibility.).

[255] FNS, chap. 7, pp. 286–87; EPA, chap. 11, pp. 436–37 (Although EPA collects demographic data as part of its environmental justice program, it does not do so as part of its Title VI program.).

[256] *See* chap. 5, p. 207.

The Department of Housing and Urban Development uses data recorded on its Form 50058, which requests detailed information on each family applying for or receiving public housing,[257] and on grantee performance reports[258] to determine a public housing agency's Title VI compliance status. Most of these data are compiled and maintained in HUD's multifamily tenant characteristics system.[259] To facilitate analysis of these data, HUD developed a database system (the CONQUEST Data System) that can provide "demographic and economic data, and a graphic profile, which thematically maps specific demographics at the state, county and [census] tract level" for comparison with recipient data.[260] This data system can be particularly helpful in identifying subtle forms of discrimination. Finally, the Federal Transit Administration's Title VI guidelines include very specific reporting requirements for its recipients. These requirements enable the Federal Transit Administration to determine, by race, color, and national origin, who its recipients serve as well as whether different standards exist for minority and nonminority areas.[261]

**Recommendation:** All Federal agencies should ensure that all recipients monitor how programs reach beneficiaries and affected individuals and that they collect data enabling the agencies to assess administration of programs fully. The information collected should include breakdowns by race, ethnicity, and national origin of the populations eligible for program benefits, the beneficiaries actually serviced, and the members of program planning and advisory bodies. It also should describe the manner in which the programs provide services and the location and process for selecting program sites. The agencies should collect this information routinely from recipients. They should compile it on a database system, similar to the Department of Labor's SPIR system, along with information about complaints, lawsuits, or pending applications involving applicants or recipients' noncompliance with Title VI. Agencies should follow the Department of Housing and Urban Development's lead and maintain demographic information regarding race, ethnicity, or national origin. This information will prove helpful to agencies administering the type of Federal program that benefits whole communities or areas, rather than specific individuals. Such programs include the operation of parks and the construction of highways. The collection of demographic data will assist agencies in conducting adverse impact analyses to ensure compliance with Title VI. From that basis, agencies can then identify whether a recipient or subrecipient's policies or practices require review. Within the agencies' civil rights offices, agencies should create a unit responsible for maintaining this database system and providing necessary analysis.

Finally, to facilitate the effectiveness of all Federal agencies' Title VI efforts, the Commission recommends that each agency maintain a database showing the history of compliance with civil rights laws of recipients and State and local agencies. This database should indicate dates and brief descriptions of findings of noncompliance; recommendations for corrective actions; suspensions, deferrals, or terminations of funding; and litigation in which the recipients or State or local agencies are involved. This information will assist agencies in performing meaningful pre- and post-award desk-audit reviews. Agencies should compile data on their own findings of noncompliance or recommendations for corrective action as well as those of other agencies. The collection of this type of interagency data will allow an agency to assess the overall civil rights compliance record of a recipient or State or local agency rather than just the record for a particular agency. Because of the resource demands that such a system can impose, the Federal agencies should develop a system to share and exchange data for the maintenance of comprehensive database systems within each agency. In the alternative, the Department of Justice should house a central databank of governmentwide compliance records from which all Federal agencies could retrieve data on recipients and State and local agencies nationwide.

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[257] U.S. Department of Housing and Urban Development, *Multifamily Tenant Characteristics System (MTCS), Form HUD-50058 Information Packet*, July 1993, p. 1-1 (hereafter cited as *Multifamily Tenant Characteristics System*).

[258] U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity, *Annual Civil Rights Data Report to Congress: HUD Program Applicants and Beneficiaries*, 1992, p. 2.

[259] *Multifamily Tenant Characteristics System*, p. 1-1.

[260] Achtenberg June 1994 letter, p. 6.

[261] *See* chap. 14, pp. 575–76.

## Planning and the Civil Rights Implementation Plans

**Finding:** Despite the Department of Justice's requirement that each Federal agency submit a written Title VI enforcement plan,[262] the Commission found that none of the Federal agencies or subagencies reviewed in this report submits Title VI enforcement plans. Instead, they submit Civil Rights Implementation Plans that address not only Title VI activities, but also civil rights enforcement activities for other civil rights statutes. The Department of Justice intended that these plans serve as an informational tool, a reporting tool, and a planning tool. However, the Commission determined that none of the agencies and subagencies' plans adequately fulfilled all three functions.

As an informational tool, some of the agencies[263] provided a detailed description of their Title VI enforcement programs. However, some of the agencies' plans[264] were deficient in this respect. As a reporting tool, all agencies' plans are deficient. None of the agencies appear to take seriously the plans' requirement that they formulate long-range goals and major and short-term objectives with measurable products and specific time frames for accomplishing them; and report on progress towards accomplishing them in subsequent plans. In particular, they either provide vague goals and objectives,[265] and/or they do not offer sufficient criteria for measuring achievement of the goals and objectives.[266]

Finally, as a planning tool, none of the agencies and subagencies reviewed tied the goals, objectives, achievements, or failures to existing budget and staffing resources. Particularly in these times of dwindling resources and growing civil rights workloads, strategic planning is necessary to ensure that resources are allocated in such a way as to maximize their benefit and ensure effective Title VI enforcement. In part, the Department of Justice intends the Civil Rights Implementation Plans to be used as management/planning tools by the Federal agencies. However, none of the Federal agencies reviewed in chapters 5 through 14 shows any evidence of using its Civil Rights Implementation Plan as a management/planning tool. For example, many plans provide no indication that the agencies have developed goals and objectives or enforcement strategies in light of their dwindling budget and staffing resources and projected increases or decreases in workload.[267]

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[262] 28 C.F.R. § 42.415 (1994). *See* chap. 4, pp. 181–82.

[263] DOL, chap. 9, pp. 371–72; SCS, chap. 7, pp. 320–21; SBA, chap. 12, pp. 468–69; DOT, chap. 14, p. 514; FTA, chap. 14, pp. 576–78; NHTSA, chap. 14, pp. 586–87.

[264] *See* DOEd, chap. 5, pp. 207–09; HHS, chap. 6, pp. 235–36; HUD, chap. 8, pp. 340–41; DOI, chap. 10, pp. 404–05; EPA, chap. 11, pp. 437–38; FNS, chap. 7, pp. 287–88; FmHA, chap. 7, pp. 304–05; FAA, chap. 14, pp. 533–34; FHWA, chap. 14, pp. 551–52; FRA, chap. 14, p. 561; USCG, chap. 14, pp. 603–04.

[265] *See* DOEd, chap. 5, pp. 207–09; DOL, chap. 9, p. 372; DOI, chap. 10, pp. 404–05; EPA, chap. 11, pp. 437–38; SBA, chap. 12, pp. 468–69; DOT, chap. 14, p. 514; FRA, chap. 14, pp. 561–62; USCG, chap. 14, pp. 603–04.

[266] *See* DOEd, chap. 5, pp. 207–08; HHS, chap. 6, p. 235; FNS, chap. 7, pp. 287–88; FmHA, chap. 7, pp. 207–09; HUD, chap. 8, pp. 340–41; DOI, chap. 10, p. 405; DOT, chap. 14, p. 514; FRA, chap. 14, p. 562; FTA, chap. 14, pp. 577–78.

Even apart from the Civil Rights Implementation Plans, the Commission could identify only two agencies that have developed a comprehensive strategic or enforcement plan for their civil rights enforcement efforts. The Department of Education's National Enforcement Strategy (NES), and successor Strategic Plan, are commendable accomplishments of the Office for Civil Rights (OCR) in strategic planning. OCR initially developed the NES at a time when it devoted increasing resources to complaint investigations to maximize the usefulness of its remaining resources.[268] The current Strategic Plan sets forth general management goals for OCR in three topic areas: the impact of available resources for civil rights on students' lives, empowering students and parents to resolve individual problems related to equal access to education, and recruiting and retaining expert OCR staff. Similar to the Civil Rights Implementation Plans, it sets forth general policy goals under each topic and general short-term and long-term strategies for realizing such goals.[269] The Department of Health and Human Services approved a similar type of strategic plan in January 1995, following the Department of Education's effort. In developing the plan, it consulted with program beneficiaries, program providers, advocacy organizations, and other customers. The result was a comprehensive and detailed planning document that included an analysis of the challenges facing the Agency's civil rights office in achieving its mission, such as the country's growing diversity and the current climate of fiscal conservatism.[270]

**Recommendation:** Deliberate and thorough planning is crucial to all Federal agencies during this period of government downsizing and limited availability of resources. All agencies must engage in an overall self-assessment of their Title VI programs to identify specific inadequacies and inefficiencies, as well as strengths. The assessment should include input from regional and State offices, recipients, beneficiaries, and other potential and actual affected parties. These self-studies should identify priority issues of concern and existing complaints about the compliance and enforcement programs. From that basis, agencies can develop comprehensive planning strategies to improve their current Title VI programs and to allocate resources as efficiently as possible.

Because the Departments of Education and Health and Human Services recently have engaged in serious planning with their strategic plans, the Commission encourages the Federal agencies to exchange ideas and suggestions for effective planning, management, and enforcement strategies. Annual workshops for the agencies' civil rights office directors would facilitate interagency communications and benefit all agencies' civil rights program planning. It also would provide a forum to discuss developments affecting Title VI law and enforcement, such as the implications of the Paperwork Reduction Act, the Civil Rights Restoration Act of 1987, and initiatives to restructure and downsize the Federal Government and to disburse more Federal funding through block grants programs.

The plans should not only describe the agencies' existing Title VI enforcement program, but also should establish long-range policy goals, supplemented by short-term goals and objectives for each type of activity supporting the Title VI programs. The short-term goals and strategies should be specific and detailed and should address each type of Federal program administered, including continuing State and block grant programs. Agencies should develop these goals and objectives with consideration of available and projected budget and resource limitations. Rather than espousing a general improvement in outreach and education activities, the goal should focus on precise issues, such as encouraging community organizations and advocacy groups to become more involved in identifying instances of discrimination and informing individuals of their rights under Title VI. The strategies should address these goals with equal specificity and thorough detail. Agencies should include time frames for accomplishment of these goals along with a schedule for reassessment every 3 months. This periodic evaluation will allow the agencies to adjust their planning to the increases or decreases in compliance and enforcement activities, changes in available funding or staffing, or new developments in civil rights laws.

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[267] *See* DOEd, chap. 5, pp. 208–209; HHS, chap. 6, pp. 235–35; HUD, chap. 8, p. 341; FNS, chap. 7, pp. 287–88; FmHA, chap. 7, pp. 207–209; DOL, chap. 9, p. 372; DOI, chap. 10, pp. 404–05; SBA, chap. 12, pp. 468–69; NHTSA, chap. 14, p. 587; USCG, chap. 14, p. 604.

[268] Office for Civil Rights, U.S. Department of Education, "National Enforcement Strategy, FYs 1991–1992," Dec. 11, 1990. *See* chap. 5, pp. 207–08.

[269] U.S. Department of Education, Office for Civil Rights, "Office for Civil Rights Strategic Plan," (draft), July 22, 1994. *See* chap. 5, pp. 207–08.

[270] *See* chap. 6, pp. 235–38.

## The Overall Enforcement Effort: Existing Inefficiencies and Inadequacies

Thus far, the Commission has presented findings and offered recommendations on Title VI enforcement efforts within the existing organizational structure, an arrangement in which each Federal agency develops and implements its own Title VI enforcement program. From a general perspective, the current design of Federal Title VI enforcement is not the most effective or efficient, especially in light of current trends. By decentralizing Title VI enforcement to each Federal agency, the agency contends with acquiring and maintaining sufficient resources for its Title VI program at a time when Congress and the American public emphasize greater fiscal responsibility and downsizing of Federal Government. As in the case of many agencies in this report, the limited availability of resources compromises efforts at developing active outreach, education, staff training, and technical assistance programs, and it limits the ability to conduct thorough compliance reviews, all with the result that certain instances of discrimination in Federal programs continue and remain unnoticed. Furthermore, the existing organizational structure does not afford sufficient protection of agencies' Title VI programs amidst the current downsizing of the Federal Government. It does not address effectively the greater role that State and local agencies are playing in Federal programs. It does not respond adequately to the need for cost-effective allocation of resources or the call for less complicated Federal control. The Commission identifies and discusses below some of these existing inefficiencies and inadequacies. As a conclusion to this report, the Commission offers a final recommendation on the enforcement of Title VI. This final recommendation holds promise for ensuring that Title VI remains of priority concern in the administration of all federally assisted and federally conducted programs.

**Finding:** The Commission found that most Federal agencies' civil rights enforcement efforts have confronted similar problems — increased responsibilities and workload due to the presence of new civil rights focuses during a period of dwindling budget and staff resources. Although it was not always clear that expanded workloads and limited resources contributed to the failures and deficiencies in Federal agencies' Title VI programs, the Commission determined that these factors provide at least a partial explanation. The Commission recognizes that some agencies have formulated strategies to maximize allocation and use of limited resources in their Title VI enforcement programs. For example, the Commission highlights the Departments of Education and Health and Human Services' development of strategic plans as well as the reliance by some agencies on delegation agreements. Despite these efforts, the existing Title VI enforcement effort of Federal agencies remains inefficient and ineffective, and it is hampered in three ways.

First, the Federal agencies provide funding to a variety of programs that operate differently and reach a diverse group of recipients and beneficiaries. However, as the Commission found, many agencies rely heavily on State-administered continuing programs in which States are responsible for performing Title VI enforcement activities and Federal agencies must conduct the oversight, coordination, and monitoring of States' efforts. In some situations, State agencies may face dual or multiple obligations to institute Title VI programs if the same State agency receives funds from different Federal agencies. These Federal agencies unnecessarily would expend too many resources if they each developed a system of oversight, coordination, and monitoring for that one State agency. To alleviate this burden and to avoid duplication in efforts, some Federal agencies have relied on delegation agreements.[271] These agreements make only one agency the responsible party for oversight and monitoring of State Title VI enforcement activities. Consequently, the State is accountable only to that agency for its Title VI obligations.[272]

Although this approach may be one method of dealing with this issue of overlapping responsibilities and obligations, it is unclear to the Commission that Federal agencies have used delegation agreements in all possible situations. As a result, Federal agencies may not be using civil rights enforcement resources efficiently in this respect. Furthermore, it only limits the number of Federal agencies to which a State agency must report on its Title VI obligations. It does not necessarily reduce the number of Federal agencies' regulations or guidelines that a State must follow. Therefore, States still may face a complex array of Federal agency rules and regulations, which often are redundant and sometimes conflicting, within the existing Title VI enforcement structure.

Second, although each Federal agency has responsibilities to enforce different program statutes that contain civil rights provisions, all agencies must enforce at least four of the major civil rights statutes, Title VI of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination Act, and section 504 of the Rehabilitation Act.[273] In some situations, training, outreach and education, and technical assistance may require a program-specific approach that only one Federal agency could provide to its civil rights and program staff, recipients, beneficiaries, and potential and actual program participants. In other situations, a consolidated effort may utilize Federal resources more efficiently, such as offering general programs that instruct staff on the basics of compliance and enforcement activities or that acquaint the public and others with the major civil rights laws. However, the Commission found little evidence that Federal agencies have coordinated or consolidated their training, outreach and education, and technical assistance efforts.

Third, although the Commission found that most Federal agencies separate internal civil rights functions from external civil rights activities, some agencies do not do so. The organizational divisions of these functions do provide some assurance that agencies do not divert budget resources and staff to Title VII and equal employment opportunity efforts. However, external civil rights functions do not receive a distinct budget allotment from Congress. As a result, there is no guarantee that Federal agencies will not allocate more funds and staff to internal civil rights activities to meet a backlog of Title VII complaints, leaving fewer resources to external civil rights activities. In addition, there is no assurance that agencies will not neglect their civil rights offices and place funds otherwise allocated to civil rights functions to non-civil rights activities within the agencies. Because of these possibilities, the existing structure of Title VI enforcement programs within Federal agencies does not sufficiently ensure that Title VI enforcement receives necessary priority, emphasis, or protection. This problem is of concern to the Commission because some external civil rights units currently function with extremely limited budgets and staffs.

In addition to these concerns about the inefficiencies and inadequacies of the existing Title VI enforcement effort, the Commission recognizes that the present Title VI enforcement programs are not equipped to handle two current trends, efforts to downsize the Federal Government and to increase State and local discretion in federally funded programs.

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[271] DOEd and HHS; SBA and DOEd, see chap. 12, p. 465; FTA and FHWA, see chap. 14, p. 575.

[272] FTA and FHWA, see chap. 14, p. 575.

[273] Since Title IX prohibits discrimination on the basis of sex "under any *education* program or activity receiving Federal financial assistance," not all Federal agencies must enforce this statute. See 20 U.S.C. §§ 1681-1688 (1988) (emphasis added).

With regard to the first trend, most Federal agencies' Title VI enforcement programs already have suffered from limited resources, as discussed above. If Congress and the President continue with efforts to downsize Government, civil rights offices will face greater workloads as some Federal agencies are eliminated or consolidated with others, while the number of federally funded programs remains the same or increases. The Commission found little indication that agencies have coordinated their enforcement efforts other than through the use of delegation agreements. Unless agencies adopt deliberate and well-planned strategies to adjust to the downsizing, their civil rights enforcement efforts will continue to suffer.

With respect to the second trend, Congress increasingly has relied on block grant funding for federally assisted programs since the 1980s. However, few agencies have distinguished among the types of funding mechanisms, nor have they provided policies or procedures designed specifically for block grants. The agencies' failure to establish policies and procedures for block grant programs is significant for two reasons. Block grant programs do not fit the traditional civil rights enforcement model. For example, the opportunities to conduct preaward reviews are limited because States receive Federal monies automatically, based on statutory formulas. Moreover, many of the block grants have unlimited mandates so that each State recipient has exclusive discretion to decide how to redistribute the Federal funds. Consequently, States, rather than Federal funding agencies, are in a better position to enforce Title VI in programs operated by their subrecipients.

The increasing reliance on block grant funding in Federal programs indicates that Federal agencies will rely more heavily on State-administered continuing programs and States' performance of Title VI enforcement activities in the future. However, the Commission found that most Federal agencies do not have adequate programs to oversee, coordinate, and monitor the Title VI enforcement activities performed by States and that some Federal agencies have no such program in place.[274] As a result, many States do not have Federal guidance on their Title VI enforcement responsibilities. If agencies' efforts in overseeing, coordinating, and monitoring State continuing programs do not improve, the Commission has serious concerns about effective Title VI enforcement in the future.

In summary, the current structure of Federal Title VI enforcement within each of the Federal agencies and their subagencies does not ensure that Title VI is enforced efficiently or that State agencies perform their Title VI responsibilities effectively. It leaves the civil rights enforcement offices that have responsibility for Title VI in jeopardy of losing resources to other priorities within the agencies. In addition, Federal agencies currently are not in a position to address the growing reliance on block grant funding and on State-administered and enforced programs. Strong, but streamlined, oversight and monitoring would be most helpful to State-run civil rights enforcement programs. However, the Federal agencies are failing in both respects. Finally, unless Federal agencies devote serious attention to consolidating and coordinating their overlapping civil rights efforts so as to maximize their limited resources, Title VI enforcement will suffer with the movement to downsize the Federal Government. To provide more efficient and effective enforcement of Title VI, Congress and the Federal agencies should consider new options beyond the current Title VI enforcement structure.

**Recommendation:** The Commission recommends that Congress conduct a feasibility study to determine whether the creation of a new, independent civil rights agency with oversight for State and local government recipients would improve the enforcement of Title VI and other external civil rights statutes while also consolidating overlapping civil rights enforcement efforts, allocating resources more efficiently, and reducing expenditures. Congress should consider reducing the size and responsibilities of Federal agency civil rights offices and redirecting those funds to a new civil rights agency. By creating an independent agency devoted exclusively to civil rights policy, implementation, compliance, and enforcement, Congress would demonstrate a commitment to constitutional and civil rights guaranteed by law, while also maximizing the resources currently devoted to civil rights activities. In light of congressional intent to convert Federal programs to State-administered block grants, this feasibility study also should assess whether the States have the resources and skills to ensure compliance with and enforcement of Title VI.

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[274] *See* discussion above on pp. 671–72.

The Commission recommends that Congress consider creating an independent agency that would oversee the implementation and enforcement of most Federal statutes and policies affecting civil rights, including those pertaining to education, housing, public accommodations, public facilities, and access to credit. Under this proposal, Congress should divide responsibility for all external civil rights activities between the new civil rights agency and State and local government recipients of Federal funds. By consolidating enforcement of civil rights laws, Congress would reduce the size of each Federal agency's civil rights office by transferring their external civil rights responsibilities to the new civil rights agency and State and local recipients. Because of the increasing reliance on State-administered Federal funding programs, the State and local government recipients of Federal funds would be primarily responsible for Title VI enforcement in their subrecipient programs and operations. The new Federal civil rights agency would be directly responsible only for civil rights enforcement in the remaining categorical grants not administered by State and local governments.

Under this proposal, the Federal agencies' civil rights offices would retain only their internal equal employment opportunity functions. The independent civil rights agency would be responsible for all external civil rights implementation, policy, coordination, compliance, and monitoring of State and local government recipients. By consolidating most of the Federal civil rights functions into a single agency, Congress would be able to eliminate costly duplications and maintain consistent and effective enforcement of Federal civil rights laws. For example, the creation of a single civil rights agency would eliminate the problems and costs associated with the "designated agency" provisions of the Americans with Disabilities Act of 1990. Furthermore, funding and staffing for external civil rights enforcement functions would not be at risk of loss to internal civil rights enforcement activities and Federal agencies' non-civil-rights needs.

As the leading expert on civil rights policies, the Department of Justice (DOJ) would retain its current leadership and oversight role. However, rather than reviewing the activities of 27 separate agencies with civil rights responsibilities, DOJ's monitoring and oversight responsibilities would focus exclusively on the civil rights activities of the independent civil rights enforcement agency. DOJ's oversight would include not only evaluating the new civil rights agency's own funding programs, but also the agency's civil rights enforcement activities. The civil rights agency would be required to obtain DOJ's approval for all regulations and to report to DOJ annually on its civil rights activities. In addition to its current monitoring activities, DOJ also would conduct periodic program evaluations of the civil rights agency to ensure that the civil rights agency is fulfilling its responsibilities. DOJ also would be responsible for training the staff of the new civil rights agency in civil rights enforcement and in program operations. DOJ would retain its authority to litigate on behalf of the Federal Government in all civil rights matters, including criminal prosecutions and civil actions and appellate proceedings.[275]

To maintain independence, the civil rights agency should be bipartisan and removed structurally from the political control of each new executive administration. The new agency should have the same status and independence as the Equal Employment Opportunity Commission. This structure would prevent conflicts of interest between program operations and civil rights enforcement, and would distinguish the civil rights agency from the Federal agencies providing financial assistance.

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[275] 28 C.F.R. § 0.50 (1994).

The civil rights agency would be subdivided to address laws and policies applying to State and local government activities, Federal contracts, federally conducted programs, and federally assisted programs. In addition, the agency would have units devoted to evaluating specific program areas such as education, housing, labor, and the environment. While the agency would have the authority to establish regulations, policies, guidelines, and procedures, DOJ would retain its current approval power. To ensure the effectiveness of the proposed agency, Congress should provide it with enforcement authority, as well as administrative policy, implementation, oversight, monitoring, compliance, complaint processing, and dispute resolution responsibilities. Enforcement authority over the other Federal agencies is essential to the prevention and elimination of discrimination and the promotion of equal opportunities. In addition, the independence of the proposed agency would eliminate the potential conflicts of interest that currently arise when an agency is required to enforce civil rights laws and policies against its own programs.

The new civil rights agency would provide funding for civil rights training, technical assistance, and outreach and education conducted by States or private organizations. The agency would establish a program modeled on the Department of Housing and Urban Development's fair housing initiatives program, which encourages grassroots organizations to participate in civil rights activities affecting their communities. The Federal agency would provide grants to organizations that demonstrate expertise in civil rights issues and the concerns of the communities they serve.

The new civil rights agency would also be responsible for conducting program evaluations of State and local government recipients of Federal financial assistance. The program evaluations should include reviews of conciliation agreements, complaint files, and methods of administration. Through these reviews, the civil rights agency will be able to monitor the daily operations of the State and local government recipients and ensure that they are fulfilling their obligations under Title VI. In addition, the program reviews should include an analysis of all the budget, staffing, resources, and planning documents. These documents are essential for determining whether the State and local recipients have sufficient resources to enforce Title VI in their subrecipient programs.

In keeping with congressional intent to reduce the Federal Government's participation in federally assisted programs, this new proposal would transfer most external civil rights responsibilities to the State and local governments administering the federally assisted programs. Under this proposal, the States would have the primary responsibility for enforcing civil rights laws in their subrecipient programs, while the Federal Government would retain only an oversight presence with reduced regulatory control over State and local governments. The States would conduct preaward reviews, compliance reviews, and complaint investigations, and facilitate voluntary compliance agreements and settlements. To ensure that the State and local governments fulfill their expanded civil rights responsibilities, it is essential that Congress include at least a majority portion of the cost of civil rights activities within the Federal block grants provided to the State and local recipients. For example, the Department of Labor provides 80 percent of the cost of training activities in its Employment Training Service program, while the States are required only to contribute the remaining 20 percent of the training costs.

This proposal represents a balance of competing interests. The proposal recognizes a growing need for a more efficient, cost-effective Title VI enforcement program, increasing reliance on State and local administration of Federal funds, while also acknowledging that the ultimate responsibility for the protection of individual and group civil and constitutional rights should remain at the Federal level through the creation of a new agency devoted to this function.

# Statement of Chairperson Mary Frances Berry and Vice Chairperson Cruz Reynoso

This report of the U.S. Commission on Civil Rights represents a comprehensive assessment of the Federal Government's enforcement efforts with respect to Title VI of the Civil Rights Act of 1964. The report is consistent with the Commission's mandate to evaluate Federal civil rights enforcement and with the original proposal for this project. The study was intended "to assess the adequacy of the Federal agencies' Title VI enforcement activities through an examination of their staff and resources, program and civil rights responsibilities, and policies and enforcement mechanisms."

This report specifically responds to the congressionally mandated requirement that the Commission produce at least one report monitoring the enforcement of Federal civil rights laws each year. Because it is an enforcement report, the Title VI study was designed solely to determine whether or not complaints are investigated, compliance reviews are undertaken, and policy guidance is given by responsible agencies pursuant to existing law. It was not designed to suggest that the law, which prohibits the receipt of Federal taxpayer funds by institutions that discriminate on the basis of race, color, or national origin, is invalid or to propose that it be changed. The Commission has issued reports on legal issues related to Title VI, including affirmative action and disparate impact theory, in the past and plans to do so in the future. For example, this year the Commission will hold a hearing on affirmative action, which will be followed by a report including the Commission's latest views on the subject. This report, however, was not intended to address such issues, but instead evaluates the actual enforcement of Title VI as it currently exists on the books.

The findings that resulted from this evaluation indicate that Title VI enforcement has long been neglected. These findings do not reflect any particular interpretation of Title VI or any particular political philosophy. Instead, the report explains that no matter what interpretation various political officials adopted in the 1970s and beyond, enforcement was neglected. The job of ensuring that minorities are included in the planning process for distributing Federal funds at the State and local level and insuring that Federal taxpayers' funds do not go to institutions that discriminate on the basis of race, color, and national origin has been severely undermined.

This final product is the culmination of an extensive effort on the part of the Commissioners to reach a consensus. The Commissioners originally received the draft Title VI report from staff in May 1995, prior to the June 1995 Commission meeting. At the request of some Commissioners, our consideration of the report was delayed until the July 1995 meeting. At that July meeting, a majority of the Commission did not vote to approve the report, with four Commissioners in support and four in opposition. At the October 1995 Commission meeting, the Commissioners agreed that our special assistants would meet and discuss the report in an attempt to reach consensus. From October until December 1995, the Commissioners and our special assistants discussed the report, exchanging nearly 200 pages of deletions and changes. At the December 15, 1995, Commission meeting, the Commissioners agreed that a facsimile vote on approval of the report would be taken on December 28, 1995. The vote was extended until January 8, 1996, and again until January 11, 1996, to accommodate any Commissioner who was inconvenienced by the government shutdown or the blizzard. All eight Commissioners voted on the report, which was approved by a majority of the Commissioners.

The importance of this report is its nearly consistent findings that Title VI has been more neglected than enforced and the recommendations that it makes for improving enforcement even with the limited resources that are currently available. There is no evidence that the public has decided to abandon a national goal that nondiscrimination is the rule in the allocation of funds for highway construction, college loans, schools, and hospitals paid for by the taxpayers. We must do a better job of enforcement to meet their goal.

# Dissenting Statement of Commissioner Constance Horner

One of the most important functions of the U.S Commission on Civil Rights is its statutory duty to monitor Federal civil rights enforcement. In 1993 the Commission agreed to examine the enforcement of Title VI of the Civil Rights Act of 1964, a subject that it had not addressed comprehensively since 1974. It was an area much in need of attention, particularly in light of the differing legal and philosophical interpretations of Title VI in the preceding 20 years. And who better than this bipartisan Commission to place the competing views on the table, sort them out, and present a broad, dispassionate accounting of the issues? Unfortunately, the Commission was not up to the job. This report should be read skeptically in the recognition that it ignores, submerges, or distorts critical points of view.

Redactions to the 1,034-page draft report (primarily deletions of partisan, inaccurate, or "controversial" material) have produced a final document that is less offensive—but no less close-minded—than the original. This report adheres to a monolithic liberal orthodoxy, unchallenged even by the legitimate legal interpretations and principles that guided Title VI enforcement throughout the administration of President Reagan.

The report would be stronger and more honest if certain deficiencies were corrected. Most fundamentally, the report fails to measure or examine the magnitude of current discrimination; in addition, it never explains or justifies the basis for its definition of a successful enforcement effort. The report assumes a single set of "*necessary* criteria for an *effective* Title VI enforcement program" that form the baseline of assessment (Executive Summary, p. 6) (emphasis added). These criteria are not part of the Title VI statute, and nowhere does the report explain how their necessity was determined or their effectiveness measured. The report itself states that "*the most significant reason* behind enacting Title VI was that *at that time* racial discrimination was rampant" (ch. 2, p. 25) (emphasis added). If the level of discrimination in the early 1960s was the primary reason for enacting Title VI, does it not stand to reason that understanding the level of discrimination in the 1990s is critical to evaluating Title VI enforcement today? Instead, this report addresses 1990s-style discrimination using a static pre-1974 enforcement model, even as it concedes that current Title VI guidelines and regulations "do not always reflect current practices and issues" (ch. 3, p. 82) and sometimes are even "outdated" (ch. 3, p. 75).

Also disappointing is the Commission's decision to quash any mention of affirmative action or disparate impact theory; large sections that dealt with these topics were dropped from the original draft report. A comprehensive report would not ignore these two major issues. If the U.S. Commission on Civil Rights cannot discuss controversial matters, then who can? We were not appointed to this Commission to shunt aside the difficult questions.

My opposition to this enforcement report reflected an understanding that improvements to the original draft report, although in progress, were not completed at the time the vote was taken. Indeed, Commissioner Robert P. George, who proposed the compromise effort to break a 4–4 deadlock, stated that the Commission's goal was to "get a report that could command a solid majority, if not unanimity, among the Commissioners on this important problem of Title VI enforcement" (transcript of December 15, 1995, Commission meeting). Such a consensus could have been achieved, but in the end, a majority of Commissioners placed more importance on holding an immediate vote (even during the Federal Government shutdown) than on spending the time and effort necessary to produce a balanced document that would receive broad support. This report presents—even promotes—a singular point of view that some Commissioners share, but it does not offer other legitimate perspectives on and interpretations of Title VI enforcement.

February 1, 1996
Washington, D.C.

U.S. GOVERNMENT PRINTING OFFICE 1996-411-207/50364

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